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No. 02-

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, as the Tenth Circuit held below in conflict with a decision of the Second Circuit and the clear import of this Court's decisions, a court determining whether property subject to public access constitutes a public forum for First Amendment purposes may ignore the location of the property, the characteristics and use of surrounding private property, and the government's intent with respect to the property.

2. Whether, as the Tenth Circuit held below in conflict with a decision of the Nevada Supreme Court, a private entity is prohibited by the First Amendment from controlling disruptive protests and other expressive conduct on its own private property merely because the property is subject to a limited easement allowing public passage.

3. Whether, as the Tenth Circuit held below in conflict with the analysis in Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992), a government cannot validly close a public forum simply by selling the underlying property to an entity that subsequently makes significant alterations to the property's physical characteristics and fundamentally changes the property's principal use.

PARTIES TO THE PROCEEDING

The petitioner is the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("the Church"). The respondents are the First Unitarian Church of Salt Lake City, Utahns for Fairness, Utah National Organization for Women, and Craig S. Axford. In addition to the petitioner Church, Salt Lake City Corporation was a defendant below.

RULE 29.6 STATEMENT

Petitioner Church is a non-governmental corporation with no parent company. No publicly traded corporation owns 10% or more of this corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
JUDGMENT FOR WHICH REVIEW IS SOUGHT	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT BETWEEN THE SECOND AND TENTH CIRCUITS ON HOW TO APPLY PUBLIC FORUM ANALYSIS TO PROPERTY SUBJECT TO PUBLIC ACCESS RIGHTS	8
II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A NARROWER CONFLICT OVER THE CIRCUMSTANCES IN WHICH A PRIVATE WALKWAY SUBJECT TO A PUBLIC ACCESS EASEMENT CAN BE DEEMED A PUBLIC FORUM	15

TABLE OF CONTENTS – continued

Page

III. IF THE ISSUE IS NOT RESOLVED IN *VIRGINIA* v. *HICKS*, THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHEN A GOVERNMENT MAY CLOSE A PUBLIC FORUM 17

IV. THIS COURT'S REVIEW IS NECESSARY TO ADDRESS THE SWEEPING PRACTICAL IMPLICATIONS OF THE DECISION BELOW FOR THE CHURCH, THE CITY, AND OTHER GOVERNMENTS AT ALL LEVELS 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page

ACLU v. *City of Las Vegas*, 13 F. Supp. 2d 1064 (D. Nev. 1998) 17

Brister v. *Faulkner*, 214 F.3d 675 (5th Cir.), *cert. denied*, 531 U.S. 985 (2000) 10

Capital Area Right to Life, Inc. v. *Downtown Frankfort, Inc.*, 511 U.S. 1135 (1994) 13

Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) 13

Commonwealth v. *Hicks*, 563 S.E. 2d 674 (Va. 2002), *cert. granted*, 123 S. Ct. 990 (2003) 19

County of Allegheny v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) 21

Craigo v. *Circus-Circus Enters., Inc.*, 786 P.2d 22 (Nev. 1990) 15

Greer v. *Spock*, 424 U.S. 828 (1976) 13

Hale v. *Dep't of Energy*, 806 F.2d 910 (9th Cir. 1986) 17

Henderson v. *Lujan*, 964 F.2d 1179 (D.C. Cir. 1992) 10

Hicks v. *Commonwealth*, 535 S.E.2d 678 (Va. Ct. App. 2000), *vacated*, 548 S.E. 2d 249 (Va. Ct. App. 2001), *aff'd in part, vacated in part*, 563 S.E.2d 674 (Va. 2002), *cert. granted*, 123 S. Ct. 990 (2003) 18

Hicks v. *Commonwealth*, 548 S.E.2d 249 (Va. Ct. App. 2001), *aff'd in part, vacated in part*, 563 S.E.2d 674 (Va. 2002), *cert. granted*, 123 S. Ct. 990 (2003) 18

Hotel Employees & Rest. Employees Union Local 100 v. *City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002) ..... *passim*

Int'l Soc'y for Krishna Consciousnes, Inc. v. *Lee*, 505 U.S. 672 (1992) 6, 17

TABLE OF AUTHORITIES – continued

	Page
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	20
S.O.C., Inc. v. *Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001)	15, 16
Southwest Adver. Inc. v. *County of Clark*, 202 F. Supp. 2d 1141 (D. Nev. 2002)	16
United States v. *Kokinda*, 497 U.S. 720 (1990)	13
Van Bergen v. *Minnesota*, 59 F.3d 1541 (8th Cir. 1995)	21
Venetian Casino Resort, L.L.C. v. *Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002)	14
Virginia v. *Hicks*, 123 S. Ct. 990 (2003)	7, 18, 23
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970)	20

CONSTITUTION AND ORDINANCE

U.S. Const. amend. I	1
Salt Lake City, Utah, Ordinance 28 (May 3, 1999)	2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion and judgment of the court of appeals are reported at 308 F.3d 1114 (10th Cir. 2002), and are reproduced in the appendix to this petition ("Pet. App.") at 1a-32a. The unpublished order of the court of appeals denying the petition for rehearing and rehearing en banc appears at Pet. App. 75a-76a. The judgment of the United States District Court for the District of Utah granting the Church's motion for summary judgment is reported at 146 F. Supp. 2d 1155 (D. Utah 2001), and is reproduced at Pet. App. 33a-74a.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2002. The court of appeals denied rehearing and rehearing en banc on November 14, 2002. On February 5, 2003, Justice Breyer granted petitioner an extension of time to and including March 14, 2003, within which to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

1. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

2. A copy of Salt Lake City Ordinance No. 28 of 1999, closing a portion of Main Street between North Temple and South Temple Streets running through the Church's property is found at Pet. App. 77a-85a.

STATEMENT OF THE CASE

In the decision below, the Tenth Circuit invalidated restrictions imposed by a church on the public's use of the church's private property because the court concluded that a limited public easement for access and passage created a traditional public forum on the church's property. The Tenth Circuit's decision conflicts with a recent decision of the Second Circuit on the question of whether, in conducting a public forum analysis, a reviewing court must give weight to (1) the location and characteristics of the property at issue (including the surrounding locale); and (2) the government's intent with respect to the property. Moreover, the decision below conflicts with a decision of the Nevada Supreme Court which, in almost identical circumstances, held that a public access easement on private property does not create a public forum. The decision below also raises important and recurring issues about the ability of state and local governments to close public fora under this Court's First Amendment precedents, and the standards that apply to such decisions.

1. In 1998, Salt Lake City ("the City") decided to sell a small parcel of land on which a segment of Main Street sat pursuant to the City's plan for downtown redevelopment. This two-acre parcel of land had never been used for protests in any significant way. Indeed, since 1995, the City had not issued even one permit for demonstrations or other expressive activities on the property. Summ. J. Mot. ¶ 28.

Because the Church previously had purchased the underground rights to the parcel to construct a parking facility, it held a right of first refusal to the surface rights. Pet. App. 3a & 35a. Therefore, the City approached the Church to inquire

whether the Church would be interested in purchasing the surface rights. The City assumed the Church would have such an interest because the Church's international headquarters and sacred sites are located on either side of this portion of Main Street. Pet. App. 2a-3a & 34a. Specifically, the Church's administration buildings lay to the east, with the Church's Temple Square to the west. See *id.* 34a & 106a (diagram of Church Plaza).

As the City predicted, the Church was interested. From the beginning, however, the Church made clear that its interest depended on its ability to purchase all the rights necessary to control activities on the property. Summ. J. Mot. ¶ 51. After the City conducted public hearings on the proposed sale, the City passed Ordinance No. 28 of 1999, closing this small portion of property to public use. See Pet. App. 77a-85a. The City then deeded the property to the Church for more than $8.1 million, which was at least its fair market value, and did so with the assurance that the Church would have the full ability to control expressive activities there. *Id.* at 35a.

In the Special Warranty Deed, the City did retain an extremely limited public easement across the Church's property. But that easement was expressly limited to "pedestrian access and passage *only*." Pet. App. 87a (emphasis added). And the deed stated that the "Property is and shall at all times remain the private property of [the Church]" and that nothing in the easement "shall be deemed to create or constitute a public forum, limited or otherwise." *Id.* at 88a & 89a. Moreover, consistent with the religious purposes of the Church Plaza that the Church planned to build, the deed expressly stated that the limited rights granted to the public did not include such activities as drinking alcohol, protesting, leafleting, or engaging in indecent or obscene speech, dress or conduct. See *id.* at 89a.

The limited easement, moreover, had no specific metes and bounds description. Rather, under the express terms of the Deed, the Church was given the right "to restrict the pedes-

trian access and passage" to specific areas of the Plaza provided that pedestrian flow "shall not be unreasonably obstructed or limited." Pet. App. 88a.

After purchasing the property from the City, the Church spent more than $20 million renovating the property, altering its characteristics, and constructing a religious plaza on it. Cf. Pet. App. 97a (photo of Main Street), with *id.* at 98a-104a (views of Church Plaza). The Church tore up and hauled away the former street and sidewalks. As a result, nothing remains of the street and sidewalks that once existed on the property. See Summ. J. Mot. ¶ 176.

The Church then constructed a new and beautiful religious plaza. Entryways were built on each end of the plaza with waterfalls and planters. Signage was erected at each entrance with the Church's name and logo, thus demarcating the entire plaza area as Church property. Plaques were set up commemorating the Church's religious history. Statues of some of the Church's religious leaders were erected. And, in the middle of the plaza, directly opposite the Salt Lake Temple, a large reflecting pool was installed to reflect the temple and project its image onto the plaza.[1] Pet. App. 50a.

Thus, as the Tenth Circuit expressly acknowledged, the new Church Plaza now fits seamlessly into the Church's campus. Pet. App. 6a. Indeed, the Plaza now sits in the *center* of the Church's international headquarters and is virtually surrounded by Church property. See *id.* at 105a-106a. For example, the Church's "Administration Block" (containing the Church Administration Building and other buildings of religious significance) abuts the plaza on the east. "Temple Square," a block containing the Salt Lake Temple, the historic Tabernacle, Assembly Hall, and other sacred buildings, abuts the plaza to the west. In fact, the Church's most holy build-

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[1] Once complete, on October 8, 2000, the Church Plaza was dedicated to God by the Church's President and Prophet in solemn religious services. *See* Pet. App. 35a.

ing – the Salt Lake Temple – rises up just a few dozen feet off the plaza to the west. And the new entrance to the Church's underground parking garage lies to the north. See *id.* Throughout this campus, moreover, lie beautiful gardens, grassy open spaces, fountains, and places for quiet reflection.

In short, people entering the newly constructed Church Plaza know immediately that they are in the heart of a religious enclave – an enclave constructed and maintained solely by the Church. Pet. App. 50a-52a.

The Church Plaza, moreover, has no sidewalks. Summ. J. Mot. ¶ 176. The walking paths of the old sidewalks no longer exist, and structural elements on the plaza prevent individuals from walking in a straight line from North Temple Street to South Temple Street within the dimensions of what were once the City sidewalks. *Id.* Instead, the Church Plaza features paved walking areas that are organized around planters, benches, the reflecting pool, and other amenities. *Id.* The result is that a visitor can take many different routes to arrive at many different destinations within the Church campus or beyond. *Id.*

For all these reasons, the Church Plaza bears no resemblance to the former City streets and sidewalks it replaced – a point that becomes readily apparent by comparing pictures of the old Main Street, see Pet. App. 97a, to pictures of the new Church Plaza, see *id.* at 98a-104a. Nor does the plaza bear any resemblance to the four large public streets – South Temple Street, North Temple Street, West Temple Street and State Street – that now surround the Church's headquarters and provide over one mile of wide public sidewalks for protests, demonstrations, and other forms of speech. See *id.* at 61a & 106a.

The principal use of the land on which the plaza sits also has changed dramatically. Pet. App. 51a-52a. The loud city street and sidewalks have now been replaced by an area of quiet tranquility and reflection. Brides and grooms emerging

from their marriage ceremonies in the temple congregate on the plaza for photographs and quiet celebration. Other Church members – some 4,500 a day – use the plaza to enter the temple so they can participate in other sacred rites. *Id.* at 51a. And many thousands of Church employees, visitors, and tourists use the plaza every day to access other Church sites. As a result, the vast majority of pedestrians who enter the Church Plaza now do so as a means to a destination *within* the Church's downtown campus. *Id.* at 52a.

2. Long after the Church had purchased the property, had torn up the street and sidewalks, and had begun construction of the Church Plaza, respondents in this case filed suit against the City, claiming that the restrictions on activities outlined in the Deed violated the First Amendment. They claimed that the easement created a public forum on the Church Plaza. The Church intervened in the lawsuit to protect its property rights.

In a detailed opinion, the district court ruled that, as a matter of law, the City's easement was at most a nonpublic forum, if it was a forum at all, and upheld the deed's limits respecting protests, picketing and distribution of materials on the property. See Pet. App. 58a & 62a. Consistent with this Court's precedents, and especially Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992), the district court reasoned that the property had ceased to be a public forum because (1) it was sold to a private entity, (2) its physical character was changed, (3) its principal use was altered, and (4) the City expressly intended to terminate all public free speech rights thereon. Pet. App. 48a. Because the easement could be considered, at most, a nonpublic forum, the district court held that the restrictions in the Deed need only be reasonable. Concluding that they were, the court entered judgment in favor of the City and the Church. *Id.* at 58a-60a.

3. The court of appeals reversed. Pet. App. 32a. The Tenth Circuit began by holding that "[e]asements are . . . con-

stitutionally cognizable property interests" and therefore "constitute a significant enough property interest" to be "subject to forum analysis." *Id.* at 12a. Applying this principle, the Tenth Circuit held that the fact that the land on which the Church Plaza sits belongs to the Church does not prevent it from being a public forum. Instead, the Tenth Circuit held that private property can be a public forum if it is "regulat[ed]" or "burdened by the government," and if the property is similar in "objective characteristics" and "purpose" to other public fora owned by the government. *Id.* at 11a, 12a, 16a & 18a. Because the Tenth Circuit found that the easement "burdened" the Church's property, and that the easement had a purpose and function similar to a public sidewalk, the court held that the easement gave rise to a public forum on the Church's property. *Id.* at 28a. The court further held that the use limitations in the Special Warranty Deed could not satisfy the strict scrutiny requirements invoked as a result of its public forum holding. *Id.* at 30a-31a.

REASONS FOR GRANTING THE PETITION

This case warrants the Court's review for three distinct reasons that extend far beyond the holding's serious practical implications for the Church and the City. First, the decision below conflicts with a decision of the Second Circuit on whether, in determining if property subject to public access rights constitutes a public forum, a reviewing court must give weight to the location and characteristics of the property (including the nature of surrounding locale), and to the government's intent with respect to that property. Second, the decision below conflicts with an earlier decision of the Nevada Supreme Court on a narrower issue – whether a walkway on *private* property subject to a public access easement can be deemed a public forum for First Amendment purposes. Third, the decision below raises a fundamental issue also embedded in *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003) (granting petition for certiorari): Under what circumstances

may a government validly close a public forum that has previously existed on a particular piece of government property? Each of these reasons for granting review will be addressed in turn, followed by a brief discussion of the significant constitutional and practical problems created by the Tenth Circuit's decision.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT BETWEEN THE SECOND AND TENTH CIRCUITS ON HOW TO APPLY PUBLIC FORUM ANALYSIS TO PROPERTY SUBJECT TO PUBLIC ACCESS RIGHTS.

The decision below directly conflicts with the Second Circuit's analysis on the question of how to apply public forum analysis to property that is subject to public pedestrian access. See *Hotel Employees & Rest. Employees Union Local 100* v. *City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002). In *Hotel Employees*, the Second Circuit held that a plaza running through the Lincoln Center arts complex in New York City did not constitute a public forum for First Amendment purposes, even though it was subject to public access rights. On the other hand, the court below held that the local government's limited property interest in the Church Plaza at issue here *did* create a public forum even though the underlying land now runs through the middle of an international religious headquarters and, indeed, is privately owned.

The conflict between the two cases is readily apparent, and it arises solely from the two very different legal standards applied by the respective courts of appeals. In the former instance, the Second Circuit considered all "relevant factors," including the plaza's "location, use, function, and purpose, together with the City's intent." *Id.* at 552. In the latter, the Tenth Circuit specifically rejected some of these factors, including the property's location and the government's intent, and opted instead for a constricted test that focuses only in the abstract upon whether the property is functionally similar to a

public sidewalk. Pet. App. 15a-16a. In their application, emphasis, and requirements the approaches are totally different. And, in the case of plazas like those at issue here and in *Hotel Employees*, this difference in approach is outcome-determinative.

1. *The Second Circuit Analysis.* In *Hotel Employees*, the Second Circuit engaged in a broad and searching analysis to determine whether the Lincoln Center Plaza constituted a public forum. This analysis focuses on all "relevant factors," including the plaza's "physical characteristics," the "objective ways in which it is used," and "the City's intent in constructing and opening it to the public." 311 F.3d at 546-47, 552.

In applying this analysis, the Second Circuit first examined the physical characteristics of the Lincoln Center Plaza. In doing so, the court found it important to examine the context of the plaza, *id.* at 547, including the nature and use of the surrounding property. It therefore spent a significant portion of its opinion describing the various art and performance buildings that surround the plaza, the streets that abut the plaza, and the various landmarks and elements that make up its locale. See *id.* at 549-50.

Given the presence of these "surrounding performing arts buildings," the "aesthetically pleasing" environs of the plaza, and the fact that the Plaza served as the "centerpiece" of a civic complex, the Second Circuit concluded that "pedestrians visiting the Plaza likely understand that they 'have entered some special type of enclave,'" *id.* at 550, and that the plaza was therefore something far different than a traditional public forum. Additionally, again looking to the surrounding environs, the Second Circuit concluded that "because the Plaza is not surrounded by government buildings, it is easily distinguished from those plazas and squares in which political speech has historically been protected." *Id.* at 552. Taking all of these surroundings into account, the Second Circuit de-

termined that "the Plaza's physical location distinguishes it from a typical recreational park or town square." *Id.* at 550.[2]

Next, the Second Circuit examined the ways in which the Lincoln Center Plaza is used. Again, however, it did not conduct its analysis without reference to the surrounding properties or buildings. Instead, it identified as "the primary factor" in its analysis on this point "how the *locale* is used." *Id.* at 547 (emphasis added) (internal quotation marks omitted). Thus, it viewed the plaza as an integrated part of the larger Lincoln Center, concluding that one of the plaza's primary functions was to serve as a "centerpiece" for that complex, connecting the various performing arts buildings and other attractions and serving as a "gathering place for those attending performances at Lincoln Center." *Id.* at 550.

This conclusion was not affected by the fact that "the Plaza is visited and used by members of the public who are not attending events at Lincoln Center," or that "the Plaza was designed as an open, public space connected to the city's 'major thoroughfares.'" *Id.* The "ability of pedestrians to cross the Plaza as a short-cut between surrounding streets," the Second Circuit instructed, had to be viewed in context, and weighed against the much larger numbers of persons who actually used the plaza to access Lincoln Center itself. *Id.* In that balance, the fact that "non-patrons use the Plaza for the purpose of traversing between surrounding streets," is

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[2] Several other courts of appeals have inquired into the characteristics of surrounding property to determine whether a parcel of land subject to a right of public access was also a public forum. *See, e.g.*, *Henderson* v. *Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (inquiring into the characteristics of surrounding property to determine whether sidewalk near Vietnam Veterans Memorial was distinguishable from traditional sidewalks); *Brister* v. *Faulkner*, 214 F.3d 675, 682-83 (5th Cir.) (considering surrounding property to assess whether there was any indication or physical demarcation between city sidewalks and state university grounds that would have given notice to an individual that she had entered into a "special 'enclave'"), *cert. denied*, 531 U.S. 985 (2000).

"merely an incidental feature" to the "principal function" of the Plaza – to serve as "centerpiece" and "entrance plaza for the Lincoln Center Complex." *Id.*

Finally, the Second Circuit evaluated the City's intent in the construction of the Plaza and in opening it to the public. Like its analysis of the preceding two factors, the Court's examination of this issue was conducted in the context of the broader Lincoln Center complex. The Second Circuit did not, for example, limit its inquiry to the fact that the City designed the property to encourage "passers-by to enter and pass through the Plaza." *Id.* at 551. Instead, it engaged in a broad analysis of a number of factors, including whether the City had "sought to limit organized speech in the Plaza," and whether, through agreements or regulations, it had "evidenced an intent to conserve the Plaza's function" as something less than a traditional public forum. *Id.* On this point, moreover, the court concluded that the City had a "strong interest in preserving the Plaza for its intended function," and that "permitting speech on all manner of public issues in the Plaza" would compromise the Plaza's status as "a specialized space devoted to contemplation and celebration of the arts." *Id.* at 552.

Taking all these factors into account, the Second Circuit rejected the claim that the Plaza constituted a public forum: "Consideration of the relevant factors, *i.e.* the Plaza's location, use, function, and purpose, together with the City's intent in building the space, demonstrates that permitting all forms of expressive activity in the Plaza would be incompatible with its 'intended purpose.'" *Id.* This was so, the Court determined, even though the public had the right to use the plaza as a pedestrian thoroughfare, *id.* at 550, and even though the plaza thus shared "some of the same physical characteristics as sidewalks or parks." *Id.* at 551 n.12.

2. *The Tenth Circuit Analysis.* The Tenth Circuit's approach stands in stark contrast to that of the Second Circuit. Rather than conducting a broad analysis of all the relevant

factors, the court below focused on the government's property interest to the exclusion of all other considerations.

Thus, unlike the Second Circuit, the Tenth Circuit refused to give any weight to the physical characteristics of the locale. Similarly, it found irrelevant the fact that the plaza over which the easement runs is surrounded virtually on every side by religious buildings and sacred sites, with the Church's name and logo at the entrances, and with religious statuary and plaques throughout. Indeed, the court below failed even to mention the nature and location of the plaza as relevant to its public forum analysis. And, in direct contrast to the Second Circuit, it did not ask whether government buildings surround the plaza, or whether those who come onto the plaza would view it as a special enclave different from the parks and sidewalks that generally constitute a public forum.

Instead, the Tenth Circuit engaged in a very narrow analysis, focusing on the government's property interest while ignoring everything else: "[I]t is the purpose of the easement, the property that is a forum of some type, and *not* the purpose of the Church plaza, *the surrounding property*, that is at issue." Pet. App. 22a (emphasis added).

The Tenth Circuit adopted the same position regarding the property's use. It expressly refused to focus its analysis, as the Second Circuit did, on the primary use of the broader locale. Had it done so, it would have determined – as the district court did – that the main purpose and function of the property was to allow access to the thousands of people who wish to visit or tour Church buildings and sites every day. Pet. App. 51a.

Finally, the Tenth Circuit also departed significantly from the Second Circuit's approach in considering governmental intent. Indeed, it ignored the very factors that the Second Circuit found to be crucial, including whether the City had "sought to limit organized speech in the Plaza," and whether through agreements or regulations, it had "evidenced an intent

to conserve the Plaza's function" as something less than a traditional public forum. *Hotel Employees*, 311 F.3d at 551.

Instead, the court below focused narrowly on the easement to the exclusion of all other considerations. Pet. App. 26a. Rejecting any consideration of the City's larger purposes, including drawing more tourists to the downtown area, creating a peaceful place for rest and relaxation, and obtaining more than $8 million in revenue, the Tenth Circuit refused to countenance the government's express intent – as evidenced in the Special Warranty Deed – that its reservation of the easement would not create a public forum of any kind on the Church's private property.[3]

To be sure, at one point the court below stated that it would "reject the contention that the City's express intention not to create a public forum *controls* our analysis" – as though the government's intent would be at least a factor. Pet. App. 15a (emphasis added). Later, however, the court simply rejected the notion out of hand, refusing to give any weight to "the City's express intent not to create a public forum." *Id.* at 28a. Instead, the court found conclusive what it characterized as

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[3] The conflict between the Second and Tenth Circuits is not undermined by the fact that the property at issue in *Hotel Employees* was an entire plaza rather than, in the Tenth Circuit's analysis here, a portion of a plaza that the court considered the functional equivalent of a sidewalk. A plaza, like a sidewalk, can be a traditional public forum. *See Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 757 (1995); *Capital Area Right to Life, Inc.* v. *Downtown Frankfort, Inc.*, 511 U.S. 1135, 1137 (1994) (O'Connor, dissenting from denial of certiorari) (downtown Mall area traditional public forum). Indeed, if anything, a public plaza is generally more likely to be treated as a public forum than a sidewalk or a street. *Compare, e.g.*, *Pinette*, 515 U.S. at 757 with *United States* v. *Kokinda*, 497 U.S. 720, 727-30 (1990) (open government owned streets leading to post office not public forum); *Greer* v. *Spock*, 424 U.S. 828, 836-38 (1976) (open government streets on military bases not public forum).

the easement's "nature and purpose . . . and its similarity to other public sidewalks." *Id.*[4]

* * * *

Simply put, the Second Circuit and the Tenth Circuit are in complete disagreement on how to determine whether property subject to public access rights is a public forum. If the Lincoln Center Plaza were located within the jurisdiction of the Tenth Circuit, that Court would hold the plaza to be a public forum *by ignoring* (1) its location in the middle of the Lincoln Center complex, (2) its primary use as an entrance and for access to the Lincoln Center area, and (3) the local government's express intent not "to provide an open forum for all forms of public expression." *Hotel Employees*, 311 F.3d at 552. Conversely, if the Church Plaza were located within the Second Circuit, that court would hold it not to be a public forum *precisely because of* (1) its location in the middle of the Church's international headquarters, (2) its primary use as an entrance and access to Church properties, and (3) the City's express intention not to create a public forum on the Church Plaza. This Court should grant certiorari to resolve the direct conflict between these two irreconcilable approaches.

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[4] In contrast, the Ninth Circuit analyzed the government's intent in *Venetian Casino Resort, L.L.C.* v. *Local Joint Executive Board of Las Vegas*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002). In that case, the Court concluded that the City of Las Vegas had acquired, by contract, a public easement over a sidewalk situated on private property owned by a casino. However, unlike this case, where the government clearly intended *not* to create a public forum, the Ninth Circuit concluded that the government there had in fact intended "that the function of the replacement sidewalk on the Venetian's property was to be the same as the former public sidewalk in front of the Venetian." *Id.* at 942. Thus, unlike the Tenth Circuit's approach here, the Ninth Circuit relied upon and gave significant weight to the government's express intent as expressed in its written agreement with the private property owner.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A NARROWER CONFLICT OVER THE CIRCUMSTANCES IN WHICH A PRIVATE WALKWAY SUBJECT TO A PUBLIC ACCESS EASEMENT CAN BE DEEMED A PUBLIC FORUM.

The Tenth Circuit's decision also conflicts with the Nevada Supreme Court's ruling in *S.O.C., Inc.* v. *Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001), on a narrower issue, namely, the circumstances in which a public access easement over a private walkway can give rise to a public forum. In *Mirage*, the Nevada Supreme Court held that, except in unusual circumstances such as "where the entity in question performed 'the full spectrum of municipal powers and stood in the shoes of the State,'" such an easement does not create a public forum. *Id.* at 248 (internal quotation marks omitted) (quoting *Hudgens* v. *NLRB*, 424 U.S. 507, 519 (1976)). And that is true, the court held, even if the property is functionally and physically identical to a public sidewalk and is part of the city's pedestrian transportation grid. *Id.* The court thus held that a privately owned sidewalk adjoining a Las Vegas casino was not a public forum for First Amendment purposes, even though the county owned a "'perpetual easement and pedestrian easement over, under, and across'" that sidewalk. *Id.* at 246.[5]

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[5] In *Mirage*, three Justices joined in the "majority" opinion, two Justices issued an opinion concurring in the result, and one Justice dissented. The court's principal opinion, however, was viewed by both the concurrence and the dissent to establish a "majority" holding. 23 P.3d at 252 (Maupin, C.J., concurring "in the majority's result"); *id.* at 252, 253, 254 & n.8 (Rose, J., dissenting) (disagreeing with the decision of "the majority"). This is consistent with prior Nevada Supreme Court cases holding that, in such a circumstance, it treats "the reasoning and holding of the plurality view as binding unless and until overruled by three or more Justices of this court or an intervening act of the Legislature." *Craigo* v. *Circus-Circus Enters., Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990). *Mirage* has not been overruled, and indeed has been relied upon as binding Nevada

In so holding, the court ruled that, under the First Amendment, privately owned property "does not lose its private nature because the public traverses upon it." *Id.* at 247. Accordingly, the "existence of [a pedestrian access] easement alone, without more, does not transform private property into a public forum." *Id.* at 247. That is because "an easement obtained by a governmental entity for a public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained." *Id.* (internal quotation marks omitted). Thus, activities unrelated to pedestrian passage exceed the public's right to use such property. See *id.*

By contrast, under the holding below, the mere existence of an easement for public passage was sufficient to transform what is indisputably private property into a public forum, even though the easement's purpose was limited solely to public passage and the parties expressly disclaimed any intent to create a public forum. Contrary to the analysis in *Mirage*, the Tenth Circuit held that such an easement *does* create a public forum if (a) the nature of the government's property interest allows the public to traverse the property and (b) that property interest would constitute a sufficiently significant interest to trigger a takings analysis under the Fifth Amendment. Pet. App. 12a & 18a.

In short, there is no question that the sidewalk in *Mirage* would have been found to be a public forum under the Tenth Circuit's analysis. Nor is there any doubt that the easement at issue in this case would *not* have been found a public forum under the analysis of the Nevada Supreme Court. That conflict warrants this Court's review.

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law. *See Southwest Adver. Inc.* v. *County of Clark*, 202 F. Supp. 2d 1141, 1145 (D. Nev. 2002) (adopting the "majority" opinion as a holding of the Nevada Supreme Court that a limited public access easement is not a public forum).

III. IF THE ISSUE IS NOT RESOLVED IN *VIRGINIA* v. *HICKS*, THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHEN A GOVERNMENT MAY CLOSE A PUBLIC FORUM.

This case also raises a third important question, namely, how a government may constitutionally close a public forum consistent with the First Amendment. As explained above, the Tenth Circuit has ruled, in essence, that a government may not constitutionally close a public forum if it chooses to retain a legal interest in the property sufficient to ensure that the property will serve the "purpose" of "pedestrian traffic." See Pet. App. 17a-18a.

Although this Court itself has never expressly addressed the question of how a government can effectively close a public forum, Justice Kennedy (joined by Justices Blackmun, Stevens and Souter) addressed that very question in his concurrence in *Lee*. Justice Kennedy stated that a public forum can validly be closed in any of three alternative ways:

> [T]he government always retains authority to close a public forum, by selling the property, changing its physical character, *or* changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.

505 U.S. at 699-700 (emphasis added). Justice Kennedy's analysis has been followed by a number of lower courts that have held that governments may legitimately choose to close a public forum. See *Hale* v. *Dep't of Energy*, 806 F.2d 910, 911-12 & 916 (9th Cir. 1986) (former public forum street closed through "various land withdrawals" and alteration into "outdoor laboratory for nuclear weapons testing"); *ACLU* v. *City of Las Vegas*, 13 F. Supp. 2d 1064, 1074-75 (D. Nev. 1998) (former public forum street closed through contract with private entity and construction of a mall).

However, the lower courts have struggled with the issue of *how* a government may properly close a public forum. And that confusion is embedded in the lower court opinion in *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003) (granting petition for certiorari), which is currently awaiting argument in this Court.

In *Hicks*, this Court granted certiorari on two questions, the second of which is whether, for public forum purposes, the Constitution "recognize[s] a distinction between actions taken by government as landlord and actions taken by government as sovereign?" Pet. for Cert. at i. In the lower-court proceedings in *Hicks*, a split panel of the Virginia Court of Appeals held that streets and sidewalks that had been "privatized" by the City of Richmond, Virginia, do not constitute a public forum. See *Hicks* v. *Commonwealth*, 535 S.E.2d 678, 683 (Va. Ct. App. 2000).

In a 6-5 decision, the en banc Virginia Court of Appeals reversed the panel decision and held that the streets and sidewalks at issue there in fact remained a public forum notwithstanding their conveyance to another entity that acted, in the City's view, as a landlord rather than sovereign. *Hicks* v. *Commonwealth*, 548 S.E. 2d 249, 254-55 (Va. Ct. App. 2001) (en banc). Like the Tenth Circuit here, that court ruled that because "the streets . . . serve the same *function* they did prior to 'privatization,'" they remained a public forum. *Id.* at 254 (emphasis added). Accordingly, the Court of Appeals held that a "trespass policy" that the City sought to enforce on that property is unconstitutional. *Id.* at 256.

Although the subsequent decision of the Virginia Supreme Court now under review in *Hicks* does not depend upon a finding that the property there is a public forum,[6] the issue of

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[6] On appeal, the Virginia Supreme Court vacated the portion of the Virginia Court of Appeals en banc decision addressing the public forum determination. It held instead that the City policy is unconstitutionally overbroad, regardless of whether the property at issue is a public forum. *See Commonwealth* v. *Hicks*, 563 S.E. 2d 674, 681 (Va. 2002).

how a government can constitutionally close a public forum could play a role in the Court's ultimate decision. In its opposition to the petition, the respondent in *Hicks* indicated its intention to defend the judgment below on the alternative ground that, even if the City policy is not unconstitutionally overbroad, it violates the First Amendment because the property, notwithstanding its conveyance to another entity, is a public forum and the policy cannot withstand strict scrutiny. Resp. Br. in Opp. at 15. In its reply brief, the State conceded that this issue "falls squarely within the second question presented." Reply Br. of Pet. at 8 n.1. Indeed, the State argued that this is an "important federal question" in its own right. *Id.*

If in deciding *Hicks* this Court chooses to address whether the allegedly privatized streets and sidewalks at issue there remain a public forum, the Court's analysis may well determine the correctness of the Tenth Circuit's decision here. Based on Justice Kennedy's analysis, this Court in *Hicks* could decide, for example, that simply conveying a public street or sidewalk is sufficient to close a public forum. And that analysis would be a sufficient basis for reversing the Tenth Circuit's decision here. Alternatively, if this Court in *Hicks* chooses not to address the public forum issue at all, this case presents a perfect vehicle to confront the issue, to resolve the conflicts and uncertainty in the lower courts, and to provide guidance on how a government may properly close a public forum.

Accordingly, this case, at a minimum, should be held pending the disposition of *Hicks*. If this Court's decision in *Hicks* resolves the general question of how a government can appropriately close a public forum, the Court should grant the petition, vacate the judgment, and remand to the court of appeals. If, on the other hand, the decision in *Hicks* does not resolve the public forum question, the Court should grant this petition and address that general issue in the context of this case.

IV. THIS COURT'S REVIEW IS NECESSARY TO ADDRESS THE SWEEPING PRACTICAL IMPLICATIONS OF THE DECISION BELOW FOR THE CHURCH, THE CITY, AND OTHER GOVERNMENTS AT ALL LEVELS.

In addition to the clear decisional conflicts presented by this case, the Tenth Circuit's decision has sweeping practical implications, not only for religious organizations such as the Church, but also for governments at the local, state and federal levels.

1. First, the Tenth Circuit's opinion creates intractable entanglement problems by mandating direct government regulation of a Church-owned plaza full of religious symbols. The Church uses the Church Plaza to spread its religious message. Depending on the season, the Church will present "'religiously oriented displays, religiously oriented exhibits, . . . religiously oriented celebrations, religiously oriented gatherings, [and] religiously oriented special events'" Summ. J. Mot. ¶ 184 (alteration in original). At Christmas, for example, the Church Plaza features several crèches. *Id.* ¶ 189.

Nevertheless, to comply with the Tenth Circuit's decision, and to avoid conflicts with the Church's maintenance and use of the plaza, the City must now coordinate with the Church regarding speech activities on the easement, especially since the easement has no defined location. Indeed, with a public forum now running across its religious plaza, the Church appears to be in the curious position of having to seek a permit from the City to engage in free speech activities on its own property. In effect, the Church now owns and operates a religiously oriented First Amendment forum – itself a constitutional contradiction – under the "official and continuing surveillance" of the City. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970). This unavoidable consequence of the Tenth Circuit's decision creates an excessive and perpetual entanglement between the City and the Church. Cf., *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971).

But another constitutional issue looms – endorsement. Under the joint management regime mandated by the Tenth Circuit, a "reasonable observer" could well perceive "a message of endorsement of religion" in the City's direct control and regulation of a plaza filled with the religious displays and symbolism of the Church. See *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

The Tenth Circuit's decision thus mandates the kind of relationship between the Church and the City that would never be tolerated if the City and the Church had created it on their own. Given the fact that the Church Plaza is visited by more than five million tourists and others every year, this is an important factor supporting review by this Court.

2. Finally, the Tenth Circuit's opinion threatens to unsettle existing property rights and significantly limit the ability of governments at all levels to sell land. Government-owned public access easements over private property are common, especially in the West. They serve the public good by ensuring, among other things, access to public beaches, parks, and hiking trails. Previously, no one supposed that granting the government a simple access and passage easement might create a public forum. Now, under the Tenth Circuit's decision, the properties of many thousands of unsuspecting private citizens may be burdened by public fora merely because of such easements.

To be sure, the Tenth Circuit stopped short of holding that *all* easements are public fora. See Pet. App. 13a n.5. But the court's excessively narrow test creates serious uncertainties about the public forum status of thousands of properties formerly thought to be wholly private.

More broadly, the Tenth Circuit's holding that a pedestrian access easement can create a public forum – no matter how limited its terms and regardless of the government's intent – has significantly limited the flexibility traditionally enjoyed

by governments at all levels in the acquisition, use and disposition of public lands and public easements. The Tenth Circuit's reasoning means that governments are powerless in many instances to close a public forum while, at the same time, retaining a limited access easement across the property. Unless overturned, the Tenth Circuit's decision will make it difficult, and in many cases impossible, for such entities to sell public property, to reserve easements in such property once it is sold, and to purchase easements from landowners for public use.

These problems are particularly acute under the Tenth Circuit's sweeping holding that mere government "regulation" is sufficient to trigger the First Amendment's public forum analysis. The court's expansive ruling on this issue will have a clear chilling effect on private parties' interest in purchasing property from the government, given that any government "regulation" may lead a future court to impose a First Amendment-protected forum on that property as well.[7]

In sum, the decision below does far more than create multiple conflicts and doctrinal problems in public forum law. It also imposes substantial practical harm on the Church, the City, and other governments at all levels that operate within the Tenth Circuit.

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[7] On this point the Tenth Circuit's holding is in substantial tension with a decision of the Eighth Circuit. In *Van Bergen* v. *Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit held that that "government regulation" is not sufficient to trigger a forum analysis under the First Amendment. *See id.* at 1552 ("the nonpublic forum analysis has not been extended to include privately-created and-owned entities, even when heavily regulated"). In *Van Bergen*, the Eighth Circuit held that no public forum analysis applies where the government only regulates private property, *id.* at 1553, in contrast to the Tenth Circuit. The Tenth Circuit, however, specifically held that "government regulation" would be enough to trigger public forum analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted. In the alternative, the petition for *certiorari* should be held for *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003) (granting petition for certiorari).

Respectfully submitted,

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March 12, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-4111.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY; Utahns for Fairness; Utah National Organization for Women; Craig S. Axford,

Plaintiffs-Appellants,

v.

SALT LAKE CITY CORPORATION, a municipal corporation,

Defendant-Appellee,

Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints,

Defendant-Intervenor-Appellee,

Association of Christian Schools International; Colorado Baptist General Convention; Colorado Catholic Conference; Community of Christ; Diocese of Colorado; Evangelical Lutheran Church in America; First Church of Christ, Scientist; General Conference of Seventh-Day Adventists; Islamic Society of Colorado Springs; Mid-America Union Conference of Seventh-Day Adventists; the Navigators; Rocky Mountain Conference of Seventh-Day Adventists; the Evangelical Covenant Church; the General Council on Finance and Administration of the United Methodist Church; Worldwide Church of God; Sutherland Institute; International Municipal Lawyers Association; National League of Cities; National Association of Counties; and Utah Association of Counties,

Amici Curiae.

Oct. 9, 2002

Before SEYMOUR, McWILLIAMS and HENRY, Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiffs brought this action under 42 U.S.C. § 1983 challenging on First Amendment grounds the prohibition of expressive activity by Salt Lake City on a public pedestrian easement retained by the City after the sale of a portion of a downtown public street to a religious organization. The district court granted summary judgment to defendant. *First Unitarian Church of Salt Lake v. Salt Lake City Corp.*, 146 F.Supp.2d 1155 (D.Utah 2001). Plaintiffs appeal and, for the reasons stated below, we reverse and remand.

I

The relevant facts set forth here are not in dispute. This case concerns a portion of Main Street in downtown Salt Lake City that the City closed and sold to the Church of Jesus Christ of Latter-Day Saints (LDS Church).[1] Main Street runs north-south through downtown Salt Lake City. The portion sold to the Church is bounded on the north by North Temple Street and on the south by South Temple Street. To the north lies a residential neighborhood. To the south is the City's business district, including two large shopping malls.

The LDS Church owns all the property on the two city blocks on the east and west sides of this portion of the former Main Street. On these blocks the Church maintains a number of important historical, administrative, and worship

[1] The sale was actually to the Corporation of the Presiding Bishop, a corporate entity wholly owned by LDS Church. We refer to both entities as "LDS Church."

facilities. The west block is called "Temple Square" and contains the Mormon Tabernacle and the Salt Lake Temple; the east block houses the Church administration buildings. Temple Square and related attractions are an extremely popular tourist attraction.

In 1995, the Salt Lake City Corporation (City) sold the subsurface rights to this portion of Main Street to the LDS Church, which the Church eventually developed into an underground parking garage. That agreement also gave the Church a right of first refusal on the surface property, should the City ever decide to sell it. In 1996, the City considered closing this portion of Main Street to automobile traffic but leaving it open to pedestrians, and also considered selling the land to the Church for this purpose. The proposal was eventually dropped.

In 1998, the City again explored the possibility of closing a portion of Main Street and selling it to the Church for the construction of a pedestrian plaza. On December 1, 1998, the City and LDS Church held a joint news conference to announce "a proposal to develop an open-space pedestrian plaza" on Main Street between North and South Temple. Aplt.App. vol. I at 356 (LDS Church news release). The Church thereafter filed a petition with the City for street closure and plans with the City Planning Commission for a pedestrian plaza.

On April 13, 1999, the City Council approved the closure and sale of the Main Street block to LDS Church subject to certain conditions. In the process leading to approval, the Planning Commission recommended that the City Council approve the sale contingent on several conditions that reflected the Commission's concern with ensuring public access and allowing public expression on the pedestrian plaza. The suggestions included a recommendation that the City retain a perpetual pedestrian easement "planned and improved so as to *maintain, encourage, and invite public use*"

and "[t]hat there be no restrictions on the use of this space that are more restrictive than is currently permitted at a public park." Aplt.App. vol. III at 1220 (emphasis added).

The ordinance the City Council adopted retained only some of these conditions. The first recommendation, that the City retain an easement for public use "planned and improved so as to maintain, encourage, and invite public use," was a condition of the ordinance as approved by the City Council. *Id.* vol. I at 191. In addition, the Council suggested during its meeting that the City retain a right of reverter to the property to ensure that the Church met these conditions, in particular providing public access. *See id.* vol. II at 401. However, the latter condition, that the plaza be regulated no more strictly than a public park, was omitted from the ordinance.

The City subsequently recorded a Special Warranty Deed and Reservation of Easement conveying the Main Street surface property to the Church. The reservation allows only non-speech conduct on the easement and also specifically prohibits a number of expressive activities. The reservation of easement reads:

> 1.3 *Pedestrian Access and Passage:* Subject to the conditions, limitations, and restrictions set forth in section 2 hereinbelow, Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage only . . . . Grantee shall not erect any perimeter fences or gates on the Property along the North Temple or South Temple rights of way . . . . Grantor may allow the general public to use this easement for pedestrian access and passage only, but all use of this easement shall be subject to the conditions, limitations, and restrictions described hereinbelow.

Id. vol. I at 361. The reservation contains the following restrictions with respect to the use of the easement:

> 2.2 *Right to Prevent Uses Other Than Pedestrian Passage:* Nothing in the reservation or use of this easement

> shall be deemed to create or constitute a public forum, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other users of the easement and are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

Id. at 362. The reservation gives the LDS Church the right to exclude anyone who has previously engaged in any of the above conduct while using the easement (the "Habitual Violator" provision). The City also reserved utility easements, access for emergency and police vehicles, and a view corridor which restricts the erection of buildings on the plaza. Finally, as suggested by the City Council, the reservation contains a Right of Reverter providing that if "Grantee fails to use the Property for the purposes set forth herein, or fails to maintain the Property thereafter," ownership may revert to the City. *Id.*

At its own expense, the Church reconstructed the former street and sidewalks, making the area an attractive plaza that fits seamlessly into the Church's downtown campus. There are paved walking areas interrupted by planters, benches, and waterfalls, a large reflecting pool, and changes in grade. The Church uses the plaza for religiously-oriented exhibits, dissemination of information, and special events, as well as for the entrance to the Temple Square.

While the Church now refers to the area as an ecclesiastical park, prior to the sale when asked how it would further the public interest, the Church variously described the proposed Main Street Plaza as "a pedestrian-friendly area," "a funnel to the Crossroads and ZCMI Center shopping malls as well as the remainder of the downtown business district," and "a downtown pedestrian plaza," and stated the plaza would "provide a public environment," "enhance the urban fabric of the downtown area," "emphasize Main Street as a primary pedestrian walkway," and "assist Main Street, which is the heart of the shopping area, to become the most pedestrian oriented street in Salt Lake City." *Id.* vol. IV at 1584-89.

Plaintiffs, which include First Unitarian Church of Salt Lake City, Utahns for Fairness, Utah National Organization of Women, and Craig Axford, filed this action challenging the sale and the easement restrictions under the First and Fourteenth Amendments and similar provisions of the Utah Constitution. Specifically, plaintiffs asserted the restrictions are facially invalid because the entire plaza, or alternatively the retained easement, remains public property on which speech cannot be so restricted. They also claimed the City had delegated to the LDS Church the discretion to interpret and enforce the restrictions in violation of the Establishment Clause, and that the property transaction itself violated the Establishment Clause because it included the challenged restrictions. They further contended the restrictions vio-

late the Equal Protection Clause because they discriminate between the Church and members of the public. Plaintiffs sought declaratory and injunctive relief.

The suit named the City as defendant and the LDS Church was permitted to intervene. All parties filed cross-motions for summary judgment.[2] After a hearing, the district court granted defendant's and intervenor's motions for summary judgment on all claims and denied plaintiffs' motion. The court determined that the physical characteristics, use, and purpose of the property had fundamentally changed after the sale and development of the plaza, and concluded that the easement was no longer a public forum.[3] The court then held that the easement is government property that "could be considered a nonpublic forum." 146 F.Supp.2d at 1174. The court nonetheless held that the restrictions are reasonable because the property would not otherwise have been sold and because the prohibited activities are incompatible with the property's new purpose, an ecclesiastical park. The court also held the restrictions do not constitute viewpoint discrimination because the LDS Church, as a private owner of the plaza property, has greater rights on the easement than members of the public.

With regard to the Establishment Clause claims, the district court held the restrictions do not delegate any municipal power to the Church because the Church was merely given the ability to enforce its rights as a private property owner.

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[2] Plaintiffs moved for partial summary judgment on only their claim that the restrictions on the easement are invalid under the free speech clause of the First Amendment. Our ruling in favor of plaintiffs on this issue nevertheless disposes of plaintiffs' remaining claims because they all rest on the existence of the easement restrictions, which we hold invalid.

[3] Plaintiffs stated in the hearing on summary judgment that they were abandoning their claim that the *entire* plaza is a public forum, and the district court accordingly ruled only on the easement.

The court rejected the Establishment Clause challenge to the sale, holding the plaintiffs did not produce any evidence of collusion between the City and the Church and the sale did not otherwise violate the Establishment Clause. The court rejected the Equal Protection Claim on the ground that any discrimination between the Church and the public rationally reflected the Church's greater rights as the property owner.

II

We review the grant of summary judgment de novo. *See Jurasek v. Utah State Hosp.*, 158 F.3d 506, 510 (10th Cir.1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed.R.Civ.P. 56(c)). In applying this standard, we review the factual record and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Id.* If no genuine issue of material fact exists, we determine whether the district court properly applied governing substantive law. *Id.* Because First Amendment interests are involved, we have an obligation to conduct an independent review of the record and to examine constitutional facts and conclusions of law de novo. *ZJ. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683, 685 (10th Cir.1998) (citing *Revo v. Disciplinary Bd.*, 106 F.3d 929, 932 (10th Cir.1997)).

We may direct that judgment be entered in favor of any moving party we conclude is entitled to summary judgment on the record before us. *See id.* (citing *Dickeson v. Quarberg*, 844 F.2d 1435, 1444 n. 8 (10th Cir.1988) (court of appeals may grant summary judgment even to nonmoving party if "'the facts were fully developed at the summary judgment hearing so that the court of appeals can determine that the nonmoving party clearly was entitled to a judgment as a

matter of law . . . and there is no procedural prejudice to the moving party.'") (quoting 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2720)).

A.

We consider first the free speech claim. The district court held *sua sponte* that plaintiffs' free speech claim was ripe only with respect to the prohibitions on "demonstrating, assembling, picketing, distributing literature, erecting signs or displays, using devices to project spoken messages or music." *First Unitarian Church*, 146 F.Supp.2d at 1163-65 (D.Utah 2001). This would preclude, for example, any attack on the prohibition against "engaging in any [ ] offensive . . . speech, dress or conduct." Aplt.App. vol. I at 362. On the contrary, however, we have no doubt plaintiffs' facial challenge to the entire set of restrictions is ripe. Significantly, it is not particular restrictions contained in the deed that are at issue because the City and the Church claim that the easement is private property and that there are no public speech rights whatsoever on it. The Church thus asserts plenary authority to regulate speech on the easement. *See* Aplt.App. vol. IV at 1382-83 (Plaza security policy). The City similarly maintains that "the easement does not allow any speech at all from those using the easement." Aple.App. at 44; *see also* Def./Aple. Br. at 22, 26, 40, 41. The issue is therefore whether the City has the authority to prohibit all expressive activities on a public easement it reserved across otherwise private property, except for the speech permitted by the private owner of the underlying estate. Because plaintiffs have asserted the intention to use the easement for expressive activity and the Church and City assert the Church is empowered to prevent any such activity, we easily conclude plaintiffs' facial claim is ripe as to the entire prohibition of speech, dress, or conduct on the pedestrian easement.

Plaintiffs contend the easement is a public forum because it has the characteristics of a public sidewalk, a traditional public forum. They also argue the easement has substantially the same characteristics, use, and purpose as the Main Street sidewalks the easement replaced and it therefore remains a public forum notwithstanding the City transferred legal title to the LDS Church. Alternatively, plaintiffs contend the easement as retained by the City is public property and is therefore at least a nonpublic forum for which the speech restrictions are neither reasonable nor viewpoint-neutral.

The City and LDS Church maintain the easement cannot be a public forum because the property's character, use, and purpose have changed sufficiently to eliminate any public forum that existed before the street was sold, and because the City expressly disavowed any intent to create or continue a public or limited forum. They also argue the easement itself cannot be government property subject to forum analysis because the scope of the easement does not include speech activities, and because an easement is an insufficient government property interest to trigger First Amendment limitations.

As an initial matter, we address the argument advanced by the City and LDS Church that the First Amendment cannot apply to the easement according to its terms because the reservation is for "pedestrian passage only" and expressly excludes speech activities. The parties contend the Church cannot be required to permit speech activities on the easement because this would exceed the scope of the property interest created by the reservation.

We agree that the reservation of easement on its face defines the easement to exclude expressive activities. However, a deed does not insulate government action from constitutional review. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) (easements to which government is party are subject to the Constitution). If government actions taken with respect to the easement violate the

Constitution, this simply means the easement terms themselves are unconstitutional and must be altered or eliminated by the involved property owners.

We next address the central contention of the City and LDS Church that the easement is not "government property" and First Amendment forum principles therefore do not apply at all. *See generally Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (determining initially whether "public forum principles apply . . . at all" to public broadcasting). The City and Church claim that because an easement is not a possessory interest in land and the Church continues to hold title to the underlying property burdened by the easement, the easement is not "government property" subject to forum analysis.

We do not disagree with the technical characterization of easements as nonpossessory property interests, *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2. However, forum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist. *See United States v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981) (applying forum principles to privately owned mailboxes "controlled by the government"); *see also Marsh v. Alabama*, 326 U.S. 501, 505, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (title to property not necessarily determinative of public speech rights on property); *Venetian Casino v. Local Joint Executive Bd.*, 257 F.3d 937, 945 n. 6 (9th Cir.2001) (sidewalks need not be government owned to constitute public fora).

Indeed, forum analysis does not require the existence of government property at all. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-01, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (rejecting argument that forum analysis requires "tangible government property" or even a

"physical situs" for the forum) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Therefore, whether we characterize the easement as a property interest belonging to the government, or as property owned by a private party but burdened by the government, the First Amendment may still apply.

The City and LDS Church similarly argue that easements cannot be subject to forum analysis because they do not constitute a significant enough property interest. We disagree. Government condemnations of easements are takings under the Fifth Amendment and entitle the grantor to compensation. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (public easement required as a condition of development permit is a taking requiring compensation); *see also Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990) (easements are property rights protected under the Utah Constitution from government takings without due process); *Hayes v. Gibbs*, 110 Utah 54, 169 P.2d 781 (1946) (same). Easements are therefore constitutionally cognizable property interests.[4]

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[4] The LDS Church also contends that permitting public speech on the easement would constitute a taking of its property. *But see generally PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (rejecting mall owner's claim that state law requiring him to permit speech at his mall was a Fifth Amendment taking of his property). Essentially the Church's claim is that speech would "take" a larger estate than the easement. Our answer is the same as our answer above addressing the argument that the free speech claim is precluded by the narrow scope of the easement itself: the issue before us is whether it is constitutionally permissible for the City to retain a pedestrian easement but prohibit expressive conduct on that easement. If we conclude it is not, it is up to the City and the Church to modify their property transaction so the actions of the City conform to the Constitution. Any claim that a potential solution to this problem, which may or may not be attempted, would itself present other constitutional problems is speculative and not before us.

Finally, holding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners.

> Highways and streets are public property only in the sense that they are subject to public use . . . . As a rule, and whether a highway is established by dedication or prescription, or by the direct action of the public authorities, *the public acquires merely an easement of passage*, the fee title remaining in the landowner.

39 AM.JUR.2D *Highways, Streets, & Bridges* §§ 182-83 (1999) (emphasis added) (citations omitted); *see also M.B.M., Inc. v. George*, 655 F.2d 530, 532 (3rd Cir.1981) ("At common law, ownership of land used as a highway belongs to the abutting landowner, subject to the public's right to use the road."); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 233 Kan. 375, 664 P.2d 798, 800 (1983) (public highways only grant easement to public; title remains in abutting property owner).

Public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Because such traditional public fora are often easements, it is evident the property here is not exempt from the First Amendment merely because it is an easement rather than land to which the government holds fee title.[5] "Wherever the title of streets and parks may rest, they

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[5] We hold only that the mere fact the government has an easement rather than fee title does not defeat application of the First Amendment. We are not holding the converse, that the First Amendment applies to all easements. Whether or not a particular government easement warrants application of forum principles will depend on the characteristics of the easement, the practical considerations of applying forum principles, and the particular context the case presents. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-77, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998).

have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (Roberts, J., concurring); *see also Venetian Casino*, 257 F.3d at 943-45 & n. 6 (applying forum analysis to city easement for sidewalk on private property); *Thomason v. Jernigan*, 770 F.Supp. 1195, 1197 (E.D.Mich.1991) (adjudicating public speech rights on municipal right-of-way reserved by easement on private property). Accordingly, we reject the argument that the government easement cannot be a First Amendment forum of any kind.

B.

Having decided forum principles apply to the easement, we proceed to analyze this case under those principles. The extent to which government may control expressive activities depends on the nature of the relevant forum. *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439.

The Supreme Court has identified three types of forums, "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633 (quotations and citations omitted). "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or government fiat,' the property has been 'devoted to assembly and debate.'" *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. 948). Designated public fora are created by "purposeful government action, . . . by intentionally opening a nontraditional public forum for public discourse." *Id.* Other property is either a nonpublic forum or not a speech forum at all. *Id.*

Plaintiffs assert the easement is a public forum because it has all the characteristics of sidewalks, which are traditional public fora "without more." *Grace*, 461 U.S. at 177, 103

S.Ct. 1702 (1983). They also assert the easement is a public forum because it is essentially the same sidewalk that ran along the former Main Street, which was unquestionably a public forum. The City and LDS Church respond that the easement cannot be a public forum because of express language in the reservation of easement stating the space does not constitute a public forum. They also argue the physical characteristics of the former Main Street have been changed sufficiently by development of the plaza to eliminate any public forum that existed along the former Main Street.

We first reject the contention that the City's express intention not to create a public forum controls our analysis. The government cannot simply declare the First Amendment status of property regardless of its nature and its public use. *See Forbes*, 523 U.S. at 678, 118 S.Ct. 1633 ("traditional public fora are open for expressive activity *regardless of the government intent* ") (emphasis added); *Grace*, 461 U.S. at 180, 103 S.Ct. 1702 (the government's own "*ipse dixit*" does not determine the First Amendment status of property); *see also Int'l Soc'y for Krishna Consciousness v. Lee (ISKCON)*, 505 U.S. 672, 694, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (Kennedy, J., concurring in judgment) (First Amendment doctrine should not "grant[] the government authority to restrict speech by fiat."). It is only with respect to designated fora that the Supreme Court's forum analysis has focused on whether there has been "purposeful government action" creating a forum "in a place not traditionally open to assembly and debate." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633; *see also Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439 (examination of whether charity drive among federal employees created designated public forum, focusing on "policy and practice" of government as well as objective nature of forum); *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286 (10th Cir.1999) ("The designated public forum . . . is one a state creates by intentionally opening a *non-traditional* forum for public discourse.") (quotation and citation omitted)

(emphasis added); *cf. United States v. Kokinda*, 497 U.S. 720, 738, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (Kennedy, J., concurring in judgment)[6] (objective factors have "more force here *than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose*." (citing *Perry Educ. Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794, and *Cornelius*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567)) (emphasis added). Examples of designated public fora include "state university meeting facilities expressly made available for use by students, . . . school board meetings open to the public by state statute, . . . advertising space in state-owned subway and commuter rail stations, . . . [and] a city owned and operated senior center sponsoring lectures." *Hawkins*, 170 F.3d at 1287 (quotations and citations omitted).

In contrast, for property that is or has traditionally been open to the public, objective characteristics are more important and can override express government intent to limit speech. *See Kokinda*, 497 U.S. at 738, 110 S.Ct. 3115 (Kennedy, J., concurring) (legitimate justifications for restrictions notwithstanding, "other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended."); *id.* at 737-38, 110 S.Ct. 3115 ("[C]ertain objective characteristics of Government property and its customary use by the public may control the case."). As Justice Kennedy wrote for a majority in *Forbes*, "public fora are defined by the objective characteristics of the property." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633. This is not to say the government has automatically created a public forum by opening property to the public, *Grace*, 461 U.S.

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[6] We cite Justice Kennedy's concurrence as controlling Supreme Court precedent because his concurrence provided the fifth vote on the narrowest grounds. *See Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir.1999) (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

at 177, 103 S.Ct. 1702, but if it has so opened the property, objective characteristics determine whether it is a public forum.

Justice Kennedy elaborated on what he meant by examining objective characteristics to determine if property is a public forum in his concurrence in *ISKCON:*

> "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property."

ISKCON, 505 U.S. at 698-99, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment). We apply these factors to assess the easement's character for First Amendment purposes. To determine the easement's nature and purpose, the question we address is whether expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether the government has expressly designated speech as a purpose of the property. *See ISKCON*, 505 U.S. at 686, 112 S.Ct. 2701 (O'Connor, J., concurring)[7] (examining whether public access is "'inherent in the open nature of the locations.'" (quoting *Kokinda*, 497 U.S. at 743, 110 S.Ct. 3115 (Brennan, J., dissenting))); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576, 107

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[7] Justice O'Connor provided the fifth vote on the narrowest grounds in this case. *See supra* note 6.

S.Ct. 2568, 96 L.Ed.2d 500 (1987) (invalidating statute for prohibiting "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—*[which] may not be 'airport related' but is still protected speech even in a nonpublic forum.*") (emphasis added).

The actual purpose and use of the easement here is a pedestrian throughway for the general public. This is not merely the use which the City has in practice permitted, but also the express purpose for which the City retained the easement. The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area to the north of the plaza and the business areas to the south.

The easement has particular public importance for the City because of the role the City envisioned the easement playing in the character and development of downtown Salt Lake City. While the City wanted to close the street to automobile traffic, it simultaneously wanted to preserve and indeed encourage pedestrian traffic. The easement through the plaza was specifically retained in order to preserve and enhance the pedestrian grid in the downtown. The City points out that developing pedestrian malls by closing downtown streets has been a stated goal of various long-range City plans for almost forty years. Aplt.App. vol. I at 214, 224, 228. As the City itself asserts, the easement was a necessary means of accomplishing these public purposes even as it sold the underlying property to the LDS Church.

Moreover, the City's actions approving the sale and the resulting property ownership structure were specifically designed to ensure these aims were accomplished, and the pedestrian easement was central to these goals. The ordinance the City Council passed approving the street closure

and sale—the City's necessary legislative act for closing and selling a public street—was expressly contingent on several conditions. The first of these was that the City retain a perpetual pedestrian easement "planned and improved so as to *maintain, encourage, and invite public use*." *Id.* vol. I at 191 (emphasis added). In addition, the reservation of easement contains a right of reverter in favor of the City that provides the property will revert to the City if the LDS Church "fails to use the Property for the purposes set forth" in the deed and easement. *Id.* at 362. In its meeting approving the ordinance, the City Council requested the City administration to negotiate a right of reverter in the deed specifically to ensure the plaza would be kept open for public use as promised. *Id.* vol. II at 401. Finally, the City has contended throughout this litigation that the City would not have agreed to the sale "but for" the easement.[8] *See, e.g.*, Aple.App. at 61. These circumstances indicate the easement is infused with public purposes even broader than providing a pedestrian walkway.

The City and Church contend the purpose of the easement is solely for ingress and egress to Church facilities. They produced evidence in the district court that the vast majority of users were those with Church business or tourists whose end destination was the plaza itself or various Church facilities. This argument is at odds with the publicly and legislatively stated purposes of the easement noted above. In addition, to the extent individuals with Church business enter onto the plaza, it is not clear they are actually using the easement because they are not utilizing the plaza for "pedestrian passage" and presumably the Church would permit those with Church business to enter the plaza in the

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[8] Indeed, the City and Church disagree as to the effect of holding the restrictions unconstitutional. The City contends this would eliminate the restrictions but not the easement; the Church contends the government would lose the easement. *See* Aple.App. at 61, 68.

absence of the easement. In other words, providing access to those with Church business is more properly characterized as a Church purpose, and does not capture the actual or articulated purpose of the easement, a pedestrian walkway for the public at large.

Similarly, the City and Church argue that not all walkways are sidewalks, and that the easement here is more similar to the walkways at issue in *Hawkins* than to a public sidewalk that is a traditional public forum. We agree that not all walkways are traditional public fora, but because the purpose of the easement is not limited to ingress and egress to Church facilities, but is intended rather for pedestrian passage, it is distinguishable from those walkways that have been held not to be public fora.[9] In *Hawkins*, we held that walkways within the Galleria, a partially open area leading to the Denver Performing Arts Complex (DPAC), were not public fora. *Hawkins*, 170 F.3d at 1287-88. In reaching that holding, we reasoned

> [t]he Galleria does not qualify as a traditional public forum, for it is *not . . . analogous to a public right of way or thoroughfare. The Galleria does not form part of Denver's automotive, bicycle or pedestrian trans-*

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[9] Although the City and Church argue the easement does not meet the legal definition of "sidewalk" and therefore should not be referred to as such, the label is not dispositive. In addressing whether the walkways at issue in *Kokinda* were public fora, the Supreme Court made no distinction between "sidewalk" and "walkway." *See, e.g., United States v. Kokinda*, 497 U.S. 720, 727-29, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990); *see also Greer v. Spock*, 424 U.S. 828, 830-36, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (referring to "public streets" within military reservation). The plurality's public fora determination in *Kokinda* turned instead on the nature and purpose of the sidewalks. *See Kokinda*, 497 U.S. at 727-29, 110 S.Ct. 3115 (plurality opinion) (post office "sidewalk" is nonpublic forum). Therefore our analysis does not depend on whether the walkways are properly referred to as "sidewalks," but on the purpose to which they are dedicated.

> *portation grid,* for it is closed to vehicles, and *pedestrians do not generally use it as a throughway to another destination.* Rather, the Galleria's function is simply to permit ingress to and egress from the DPAC's various complexes.

Id. at 1287 (emphasis added). Similarly, a plurality of the Supreme Court held in *Kokinda* that the sidewalks leading to a post office were not public fora because they led only from the post office parking lot to the post office building, and their sole purpose was to provide ingress and egress to the post office. *Kokinda*, 497 U.S. at 727, 110 S.Ct. 3115 (plurality opinion of O'Connor, J.) ("[t]he postal sidewalk at issue does not have the characteristics of public sidewalks" because it is not a "public passageway" or "thoroughfare" but "leads only from the parking area to the front door of the post office . . . [and] was constructed solely to provide for the passage of individuals engaged in postal business."); *see also Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (streets and sidewalks on military reservation are not public fora because they are entirely within the compound and the military has unquestioned authority to control activity on military bases); *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir.1998) (sidewalks on the pier are not traditional public fora because they "are not through routes; they lead only to the pier facilities themselves.").

The purpose of the easement in this case is for pedestrian passage, it forms part of the downtown pedestrian transportation grid, and it is open to the public. The easement therefore shares many of the most important features of sidewalks that are traditional public fora. This similarity is a persuasive indication that the easement is a traditional public forum. *See ISKCON*, 505 U.S. at 698-99, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment) (whether property shares physical similarities with traditional public forums is

one of most important factors in defining public fora); *see also Frisby*, 487 U.S. at 480, 108 S.Ct. 2495 ("'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.") (quoting *Hague*, 307 U.S. at 515, 59 S.Ct. 954 (Roberts, J., concurring)); *Grace*, 461 U.S. at 177, 103 S.Ct. 1702 ("public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, *without more,* to be public forums." (quotation and citation omitted) (emphasis added)). The easement here is thus better compared to the easement which the Ninth Circuit held was a public sidewalk, and therefore a traditional public forum, in *Venetian Casino*, 257 F.3d at 944 ("[T]he sidewalk is used to facilitate pedestrian traffic along the Las Vegas strip generally and not merely to provide access to the Venetian for its patrons.").

We also consider whether speech activities are compatible with the purpose of the easement. *See ISKCON*, 505 U.S. at 698-99, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment). In doing so, we presume the availability of reasonable time, place, and manner restrictions, so we do not consider "theoretical incompatibilities" that could be avoided. *Id.* at 699, 112 S.Ct. 2701. Moreover, it is the purpose of the easement, the property that is a forum of some type, and not the purpose of the Church plaza, the surrounding property, that is at issue.[10]

Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage. *See, e.g., ISKCON*, 505 U.S. at 686, 112 S.Ct. 2701 (O'Connor, J., concurring) (determining whether

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[10] In this respect, the district court erred in considering whether speech activities were compatible with an "ecclesiastical park." Providing for a religious park is the purpose of the surrounding plaza property, not the easement, and must be the Church's purpose, rather than the City's.

airport is public forum by examining whether public access is "inherent" in the open nature of the location). Given that the easement shares most of the characteristics of a traditional public sidewalk, which is an "archetype" public forum, *Frisby*, 487 U.S. at 480, 108 S.Ct. 2495, it is implausible that *all* speech activities (which is what the City purports this easement prohibits) would practically interfere with the use of the easement for pedestrian passage. *See, e.g., Lederman v. United States*, 291 F.3d 36, 43 (D.C.Cir.2002) ("If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers . . . then we assume they are also capable of circumnavigating the occasional protester."). We also note the City itself first proposed requiring the Church to regulate speech on the plaza no more restrictively than a public park. In short, it is evident that the use of this property, which is similar to a traditional public sidewalk, is compatible with expressive activities.

The City and Church assert any expressive conduct by the public would interfere with the character of the surrounding private property, the Church's private property rights on the easement, and the Church's own ability to communicate. Protecting the Church's expression from competition is not a legitimate purpose of the easement or its restrictions, so we do not consider its compatibility with speech. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-87, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (requiring shopping center owner to permit public speech does not infringe on owner's free speech rights). With respect to the other arguments, to the extent they relate to the purpose of the easement rather than the surrounding property, the effects of expressive activity such as congestion, noise, and disruption within reasonable limits are the necessary cost of securing our First Amendment freedoms and these effects must be tolerated to a reasonable extent. *ISKCON*, 505 U.S. at 701, 112 S.Ct. 2701 (Kennedy, J., concurring in judgment) ("The First Amendment is often inconvenient. But that is beside the point.

Inconvenience does not absolve the government of its obligation to tolerate speech."). Therefore, although a government may always enforce, at a minimum, reasonable time, place, and manner restrictions on public expression, a desire for peace and order does not support a conclusion that a public space such as this is not a public forum.[11]

Finally we consider the history of the property. Whether property has traditionally been open to public use is a factor indicating the property is a public forum, although this is not determinative. *See Grace*, 461 U.S. at 179, 103 S.Ct. 1702. The property here is undisputedly open to public use.

A more important factor is whether the property has traditionally been the site of expressive activities by the public. *See Forbes*, 523 U.S. at 677, 118 S.Ct. 1633 (factors such as "whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate'" determine whether property is public forum) (quoting *Perry*

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[11] In this regard, having determined that the easement warrants the application of First Amendment principles, and recognizing it has the characteristics of traditional public sidewalks, we do not believe the special nature of this particular pedestrian passageway—that it traverses private property rather than abuts a public street—defeats its status as a public forum. The Supreme Court has made clear that once an "archetype" of a public forum has been identified, it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected forum. *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). The Court rejected the argument that public streets that are narrow and located in quiet residential neighborhoods are therefore not public fora, stating "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora." *Id*; *see also ISKCON*, 505 U.S. at 697, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment) ("open, public spaces and thoroughfares that are suitable for public discourse may be public forums, . . . without concern for a precise classification of the property."); *Grace*, 461 U.S. at 177, 103 S.Ct. 1702 (sidewalks are normally public fora "without more").

Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. 948); *Grace*, 461 U.S. at 178, 103 S.Ct. 1702 (areas traditionally held open for expressive activities are normally public fora). The government previously permitted public expression in this area when it was a public sidewalk abutting Main Street, but it has not ever permitted public expression on the easement. We give no weight to the fact that the government has not "traditionally" permitted speech activities since it sold the property and retained the easement. Where courts have considered the traditional use of publicly accessible property for speech, they have refused to attribute legal significance to an historical absence of speech activities where that non-speech history was created by the very restrictions at issue in the case. *See Grace*, 461 U.S. at 180, 103 S.Ct. 1702 ("Government may not by its own "*ipse dixit*" destroy public forum status"); *Lederman*, 291 F.3d at 43 ("restrictions cannot bootstrap themselves into validity by their mere existence" (quotation, citation and emphasis omitted)). This is particularly true where the property was a public forum before the government restrictions were put in place. As the Supreme Court stated in *Grace*,

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts [ ] property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.

Grace, 461 U.S. at 180, 103 S.Ct. 1702.

This raises the issue of the relevance of the easement's prior history, as public sidewalks, to our analysis. The plaintiffs argue, more generally, that the easement remains a public forum precisely because the property was previously a

public forum and it has not been sufficiently altered to destroy that status. The City and Church contend significant changes in the physical characteristics and use of the property have eliminated any prior public forum. The mere fact that a space is on what used to be a public street does not automatically render it a public forum. *See Hawkins*, 170 F.3d at 1287 ("'In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.'" (quoting *ISKCON*, 505 U.S. at 699-700, 112 S.Ct. 2701) (Kennedy, J., concurring in judgment)).

The district court concluded that both the physical characteristics and the principal use of the property had been altered sufficiently to eliminate the previous public forum. We disagree that the principal use of the easement has changed. As we previously stated, the district court considered the religious purpose of the plaza when it should have considered the purpose of the easement. The purpose of the easement is to provide a pedestrian throughway that is part of the city's transportation grid, and in this respect it is identical to the purpose the sidewalks along that portion of Main Street previously served. Similarly, to the extent the walkways provide access to the Church facilities as an end destination for tourists, which is another stated purpose of the easement, the former sidewalks along Main Street similarly provided tourists with the means of accessing portions of the Church campus open to them. In *Hawkins*, the court found that the walkways had changed sufficiently not only because they served a different purpose—ingress and egress to the DPAC facilities—but also because their physical nature was different, that is, they dead-ended at DPAC rather than remaining part of the city's pedestrian grid. *Id.* Here, while certain physical characteristics of the walkways have changed, they are still intended to provide passage through, not to, Church property.

As stated above, a pedestrian throughway was the primary purpose to which the City expressly dedicated the easement. The previous public street and sidewalks provided access between these two city blocks, were part of the city's transportation grid, served this function in a central downtown location, and were highly desirable because of the large size of city blocks in downtown Salt Lake City. It was clearly the intent of the City to retain these aspects of the previous space with respect to pedestrians. In addition, the ordinance approving the street closure required an easement "planned and improved to *maintain . . . public use*." Aplt.App. vol. II at 401 (emphasis added). The City therefore deliberately retained the pedestrian throughway that existed before it closed the street.

In retaining the easement, the City not only retained the most important functions of the property, but also the functions most often associated with speech activities. *See, e.g., Hawkins*, 170 F.3d at 1288. Thus, while the government has the power to change the status of a forum, "when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, *and bear the attendant costs*." I*SKCON*, 505 U.S. at 700, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment) (emphasis added); *see also Hawkins*, 170 F.3d at 1287-88 (to eliminate public forum state must alter physical characteristics and bear attendant costs) (quotation and citation omitted). We are convinced the City has attempted to change the forum's status without bearing the attendant costs, by retaining the pedestrian easement but eliminating the speech previously permitted on the same property. In effect, the City wants to have its cake and eat it too, but it cannot do so under the First Amendment.

"As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, 497 U.S. at 737-38, 110 S.Ct. 3115 (Kennedy, J., concurring

in judgment). We think this is particularly true with respect to downtown public spaces conducive to expressive activities. The prior history of the easement here is highly relevant to whether the property has traditionally been open to public speech. Because the property was a public forum prior to the sale, we conclude the retained easement has traditionally been open to speech activities.

In sum, the easement's history, as well as the other contemporary characteristics of the easement discussed above, support the conclusion that the easement is a public forum. The objective nature and purpose of the easement and its similarity to other public sidewalks indicate it is essentially indistinguishable from other traditional public fora. We reach this conclusion in spite of the City's express intent not to create a public forum, because the City's declaration is at odds with the objective characteristics of the property and the City's express purpose of providing a pedestrian throughway. Accordingly, we hold that the easement is a public forum.

C.

We turn to whether the restrictions on speech activities on the easement are valid. In a traditional public forum, the government's power to restrict expressive conduct is "very limited." *Grace*, 461 U.S. at 177, 103 S.Ct. 1702.

> For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. 948 (citation omitted). In public fora, "the government may not prohibit all communicative activity." *Id.*

The "restrictions" here virtually ban speech because, as we pointed out above, the City and LDS Church maintain that the public has no speech rights whatsoever on the easement except as the Church may permit, which amounts to the same thing. As such, the restrictions are invalid. *Id.* The Supreme Court has held such broad bans invalid even under a non-public forum analysis. *See Bd. of Airport Comm'rs*, 482 U.S. at 574-75, 107 S.Ct. 2568 (invalidating ban on all "First Amendment activity" at LAX airport). As Justice O'Connor wrote for a unanimous court:

> On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. Instead, the resolution . . . prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.

Id. at 574-75, 107 S.Ct. 2568. The City has similarly attempted to create a "First Amendment Free Zone" on the easement and this attempt too must fail.

The City contends that acquiescing to the LDS Church's demand to control speech on the easement was necessary to obtain the Church's agreement to buy the property. That may be true, but the City may not exchange the public's constitutional rights even for other public benefits such as the revenue from the sale, and certainly may not provide a public

space or passage conditioned on a private actor's desire that that space be expression-free. The City must "'bear the attendant costs.'" *Hawkins*, 170 F.3d at 1288 (quoting *ISKCON*, 505 U.S. at 700, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment)). If it wants an easement, the City must permit speech on the easement. Otherwise, it must relinquish the easement so the parcel becomes entirely private.

The City and Church maintain they may legitimately seek to protect the Church and the sanctity of its property from public speech. This is true to a certain extent. As with any public forum, the City may enact reasonable time, place, and manner restrictions. *See Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. 948. Governments routinely pursue public objectives in regulating the time, place and manner of speech on public fora without running afoul of the Constitution. Such legitimate objectives include public safety, accommodating competing uses of the easement, controlling the level and times of noise, and similar interests. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 792, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (government desire to "retain the character of the [park] . . . and to avoid undue intrusion into residential areas and other areas of the park" justify noise level restrictions in public park); *Frisby*, 487 U.S. at 484-86, 108 S.Ct. 2495 (interest in "residential privacy" justifies ban on targeted picketing of particular houses). Thus while the purpose of the forum is a pedestrian easement, the City may take the interests of surrounding property owners into account in enacting regulations, and may seek to accommodate competing uses of the easement.

We are not insensitive to the multitude of activities that occur in any downtown setting and the competing property uses at issue here, particularly given that the Church is the primary anchor of interestin the property. But the City may not take action that runs afoul of our first and primary amendment. Our Country's dedication to both free expression and non-Establishment are among its greatest heritages,

and our fealty to the concept of a marketplace of ideas in religion as well as other fields has been the hallmark of our society. Moreover, we remind the City that "[t]he First Amendment is a limitation on government, not a grant of power." *ISKCON*, 505 U.S. at 695, 112 S.Ct. 2711 (Kennedy, J., concurring in judgment). The City's attempt to create a public throughway but withhold speech rights on that throughway is ineffectual simply because the City has attempted to exercise power the First Amendment does not afford.

III

Because we hold the easement restrictions invalid, we need not reach the plaintiffs' remaining federal or state claims. The LDS Church does, however, raise two further arguments we must address. The Church asserts that granting the relief plaintiffs' request would entangle the City in joint administration of the easement with the Church in violation of the Establishment Clause. We are not persuaded. We hold here that the City, not the Church, has responsibility for regulating speech on the easement. While the City may legitimately accommodate the unique location and setting of the easement, to the extent the City overly involves the Church in that regulation it will run afoul of the limits on its actions we announce today.

The LDS Church also claims that permitting public speech on the easement would infringe on the Church's right of free expression. We also reject this contention because the Church has no First Amendment right to be protected from public speech. The speech of others does not, as a matter of law, infringe on an individual's own free speech rights. *See PruneYard Shopping Center*, 447 U.S. at 85-87, 100 S.Ct. 2035 (free speech rights of shopping mall owner not infringed upon by state law requiring owner to permit speech in mall).

Our conclusions in this case do not depend on any facts in dispute. Accordingly, summary judgment for plaintiffs is appropriate. *ZJ. Gifts D-2, LLC*, 136 F.3d at 685 (citing *Dickeson*, 844 F.2d at 1444-45 n. 8). Plaintiffs are entitled to declaratory and injunctive relief with respect to the ban on expressive conduct on the easement.

IV

For the reasons stated above, we REVERSE the judgment of the district court and REMAND with instructions to enter judgment for plaintiffs consistent with this opinion.[12]

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[12] Appellee's "Motion to Strike" filed August 27, 2001, by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints is denied.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. UTAH, CENTRAL DIVISION.

No. 2:99-CV-912-ST.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY; Utahns for Fairness; Utah National Organization for Women and Craig S. Axford,

Plaintiffs,

v.

SALT LAKE CITY CORPORATION, a Municipal Corporation,

Defendant,

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,

Intervenor.

May 4, 2001

ORDER GRANTING DEFENDANT'S AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STEWART, District Judge.

This matter came before the court on January 2, 2001, for hearing on Defendant City's and Intervenor's Motions for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment.

I INTRODUCTION

Plaintiffs want the right to stage demonstrations for the expression of their political and religious beliefs on property that was formerly Main Street between South Temple and North Temple and is now a privately-owned Church Plaza. Defendant City sold the disputed property (the Property) to the Intervenor, which now owns and maintains a Church Plaza on the Property. Plaintiffs seeks declaratory and injunctive relief that restrictions on the use of the City's retained pedestrian easement across the Church Plaza violate their rights under the First Amendment and to Equal Protection under the federal constitution and under the Establishment clauses of the U.S. and Utah constitutions. The parties all move for summary judgment. The court finds no material issues of fact and grants summary judgment against Plaintiffs and in favor of the City and the Intervenor.

II

Plaintiffs are the Unitarian Church, the Utah National Organization of Women, Utahns for Fairness and an individual, Craig Axford. The defendant is Salt Lake City corporation, seller of the surface rights to the portion of Main Street located between South Temple and North Temple. Intervenor is the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints (CPB), purchaser of the Property. The CPB is the property-holding corporation that conducts the temporal affairs of the Church of Jesus Christ of Latter Day Saints (LDS Church).

The Property consists of a parcel formerly containing the street and sidewalks of Main Street, between North Temple and South Temple streets. The Property is located between two city blocks owned by the CPB. The block to the west of the disputed Property is the well-known Temple Square, site of buildings of religious and historic interest. The block to the east is known as the Church Administration Block and contains buildings housing administrative functions of the

LDS Church as well as buildings of historic interest. CPB's Ex. 5 Nielsen Aff. ¶ 7 and Maps 3, 5 and 6.

On April 13, 1999, the Salt Lake City Council, in a 5-2 vote, passed Ordinance No. 28 of 1999, which authorized the sale of the surface rights for the Property pursuant to several conditions and the Warranty Deed, including a pedestrian easement, as agreed to by the CPB and the City. In order to sell the surface rights to CPB for the express purpose of allowing CPB to build the Church Plaza, defendant City closed the portion of Main Street that formerly occupied the Property. Previously, in 1993, the CPB or the LDS Church acting through Reserve Property Inc., purchased the subsurface rights to the Property for the purpose of building a parking garage and held a right of first refusal for the surface rights. A parking garage was built under the Property shortly before construction began on the Church Plaza in May 2000. The Church Plaza was dedicated in October 2000.

On April 27, 1999, the City, acting through the Mayor, executed the Special Warranty Deed which contains a reservation of easement for pedestrian use. The Warranty Deed also preserves for the City an uninterrupted view corridor over the Property, a right of reverter, plus emergency and public safety easements and easements for public and private utilities.[1]

The Property's $8.124 million purchase price is the full market value without any reduction for the City's reserved easements, right of reverter or preservation of the view corridor. Cordova Aff. ¶¶ 18 and 20.

The pedestrian easement (hereinafter "easement") is expressly limited to pedestrian access: "an easement over and across the surface of the Property for pedestrian [2] access

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[1] These easements are not at issue in this case.

[2] Bicycles and leashed dogs may be walked across the pedestrian easement; skate boards, roller blades and roller skates are not allowed. Special Warranty Deed at § 1.3.

and passage only;" provides the Property shall be available for access for such pedestrian "access and passage at all times, both day and night," and provides no perimeter fences shall be erected on the North or South Temple right of way. Special Warranty Deed at § 1.3. The easement provides the City (the Grantee) "may allow the general public to use this easement for pedestrian access and passage only" but all such use is subject to several conditions, which conditions form the basis of this lawsuit. *Id.* The Warranty Deed contains integration and severability clauses and specifically provides that the pedestrian easement can be modified or terminated by written agreement of the City and the landowner (CPB).

The Warranty Deed provides the pedestrian easement is expressly subject to the following conditions as follows:

> 2. *Conditions, Limitations and Restrictions.* Notwithstanding anything to the contrary in this instrument, the easements reserved herein are subject to the following conditions, limitations and restrictions:
>
> * * * * * *
>
> 2.2 *Right to Prevent Uses Other Than Pedestrian Passage.* Nothing in the reservation of use of this easement *shall be deemed to create or constitute a public forum, limited or otherwise* on the Property. Nothing in this easement *is intended to permit any* of the following enumerated or similar activities on the Property: *loitering, assembling,* partying, *demonstrating, picketing, distributing literature,* soliciting, begging, littering, consuming alcohol beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), *erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any* illegal, *offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct,* or otherwise disturbing the peace. Grantee *shall have the right to deny*

access to the Property to persons who are disorderly or intoxicated or *engaging in any of the activities identified above.* The provisions of this section are intended to apply only to Grantor and other users of the easement and *are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.*

2.3 *Right to Exclude Habitual Violators.* Grantee may prohibit and *lawfully prevent access to the Property by individuals who:* (a) have threatened or intentionally caused harm to leaders or members of the Church of Jesus Christ of Latter-day Saints; (b) have threatened or intentionally caused damages to buildings or property owned or used by the Grantee or by the Church of Jesus Christ of Latter-Day Saints; or (c) *have on more than one previous occasion entered on the Property and engaged in activities identified in section 2.2* above.

3. Enforcement. *Grantee may use all lawful means available to owners of private property to prevent any uses of the easements which are contrary to the provisions of this instrument.*

Warranty Deed 1-3 (underlining in original, italicized emphasis added).

III

A.

Plaintiffs seek declaratory judgement that the walkway areas of the Property are, like the city sidewalks formerly on the Property, a public forum where expression is protected by the First Amendment. They contend that despite the sale the walkways retain their status as a public forum and the City and the CPB could not alter that status by sale or by "fiat."

Plaintiffs contend that the restrictions in the pedestrian easement contained in the Warranty Deed violate their rights under the state and federal constitutions and various federal civil rights statutes. Plaintiffs bring the following claims:

B. First Claim—First Amendment

Plaintiffs' First Claim is based upon the First Amendment protections for freedom of expression and association. Plaintiffs contend that the Property remains a public forum where their right to expression may not be restricted; that the provisions of the pedestrian easement are facially invalid restrictions on their ability to engage in expression on the Property; that the restrictions are vague, arbitrary and discriminatory; that the restrictions are government-sanctioned content and viewpoint discrimination because the restrictions favor the LDS Church and its beliefs and opinions. Plaintiffs contend the restrictions violate the First Amendment as made applicable by the Fourteenth Amendment; the Civil Rights Act of 1871 and 42 U.S.C. §§ 1983 and 1988.

C. Second Claim—Establishment Clause

Plaintiffs contend the City is violating the Establishment Clauses of the First Amendment of the U.S. Constitution and the Utah Constitution (Article 1, Section 4) and 42 U.S.C. §§ 1983 and 1988, by its conduct in allegedly: authorizing the CPB to prohibit speech it finds offensive while simultaneously allowing the CPB unfettered use of the Property to promulgate is own message; authorizing the CPB unbridled discretion over which members of the public will be allowed to use the public easement, an alleged traditional state function; endorsing the LDS Church, and entangling the same in governmental functions without secular purpose; purporting to dedicate a park-like public forum for the exclusive control of a religious organization; unconstitutionally blurring the distinction between church and state property giving the

impression that the LDS Church occupies a privileged position and that the City endorses that Church's messages.

D. Third Claim—Equal Protection

Plaintiffs contend the City violated their constitutional rights to equal protection of the laws under the First, Fifth and Fourteenth Amendments of the U.S. Constitution, the Utah Constitution (Article 1, Section 24) and 42 U.S.C. §§ 1983 and 1988 by imposing or allowing imposition of vague, arbitrary and discriminatory restrictions on the public's right to use the Property while simultaneously allowing the CPB and those of whom it approves unrestricted access. Plaintiffs contend that the restrictions are not related to and do not serve any compelling or substantial state interest, and constitute invidious discrimination with the purpose and effect of disfavoring Plaintiffs' speech in favor of that of the LDS Church. In addition, Plaintiffs contend that their rights to engage in lawful conduct on the Property pursuant to the easement is subject to the invidious discrimination "through the administrative and legal machinations of the City government." This last position is a reference to Plaintiff's position that the restrictions in the easement were somehow sneaked by the public in order to obtain approval for the sale.

E. Relief Sought

Plaintiffs seek injunctive and declaratory relief, basically the same relief for each claim. Plaintiffs seek an injunction as follows; an injunction against Defendants violating their constitutional rights; and, an injunction prohibiting the CPB from enjoying exclusive control and use of the Property for its own expressive purpose until and unless Plaintiffs are granted equal access and equal rights to use the Property.

Plaintiffs additionally seek declaratory judgment that the Property is a public forum; that the City has violated Plaintiffs' constitutional rights regarding the alleged public forum; that the restrictions in the deed/easement violate their

constitutional rights by discriminating on the basis of content/viewpoint and are therefore null and void; and, that Defendant is required to promulgate and administer reasonable constitutionally permissible regulations on access to and enjoyment of the Property. Plaintiffs also seek attorneys fees and costs.

IV

Plaintiffs contend a condition known as Condition 15, proposed by the Salt Lake Planning Commission (an advisory board), was deleted from the terms of the sale without adequately informing the public that it would not be a condition of sale. Condition 15 would have required that "there be no more restrictions on the use of the space that are more restrictive than is currently permitted at a public park." In 2000, the City Council passed Ordinance No. 29 of 2000, which clarified the Council intended to exclude Condition 15 from the deed. This action mooted a separate lawsuit regarding the Property by plaintiff Axford.

Although the Plaintiffs make much of the facts leading up to the sale, the Intervenor is correct that those facts are not relevant to the issues of summary judgment on Plaintiff's claims. Therefore, to the extent the facts leading up to the sale are disputed, they are not material. What is material in this challenge to the restrictions in the pedestrian easement is the language of that easement and the nature of the Property to which that language is applied.

V

Each party brings a summary judgment motion. The standard on summary judgment is well-known:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, we

> examine the factual record and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Bullington*, 186 F.3d at 1313.
>
> As the moving parties, defendants shoulder the "initial burden to show that there is an absence of evidence to support the nonmoving party's case." *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir.1995) (internal quotation marks and citation omitted). If defendants meet this burden, it falls to plaintiff to "identify specific facts that show the existence of a genuine issue of material fact." *Id.* "The party opposing the motion must present sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor." *Id.* (internal quotation marks and citation omitted).

Clinger v. New Mexico Highlands Univ. Bd. of Regents, 215 F.3d 1162, 1165 (10th Cir.2000).

> An issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *See id.* If a party that would bear the burden of persuasion at trial does not come forward with sufficient evidence on an essential element of its prima facie case, all issues concerning all other elements of the claim and any defenses become immaterial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) . . . .

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670-71 (10th Cir.1998)

The court will address the summary judgment motions in connection with each of Plaintiffs' three claims. However, the court must first address ripeness.

VI

The easement restrictions at issue have not yet been enforced or applied by Property owner CPB or Defendant City. The parties have not raised an issue of whether there is a case or controversy that is ripe for decision. *See Capital Bonding Corp. v. New Jersey Supreme Court*, 127 F.Supp.2d 582, 597 (D.N.J.2001) ("Ripeness is a prerequisite to all federal actions, including those for declaratory or injunctive relief, and is sufficiently important that courts are required to raise the issue *sua sponte* even though the parties do not."). Thus, the court must examine the issue of ripeness *sua sponte* despite the parties' desire to have a constitutional issue decided.

> In order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy. "[R]ipeness is peculiarly a question of timing," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in "'clean-cut and concrete form.'" *Renne*, 501 U.S. at 322[, 111 S.Ct. 2331] (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947)).
>
> As a general rule, determinations of ripeness are guided by a two-factor test, "'requiring us to evaluate both the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.'" *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir.1990) (quoting *Abbott Labs.*, 387 U.S. at

149[, 87 S.Ct. 1507]). In determining whether an issue is fit for judicial review, the central focus is on "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Wright, Miller & Cooper, Federal Practice & Procedure, § 3532 at 112. To this end, courts frequently focus on whether a challenged government action is final and whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed. *See Sierra Club*, 911 F.2d at 1415; *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495 (1st Cir.1992). In assessing the hardship to the parties of withholding judicial resolution, our inquiry "'typically turns upon whether the challenged action creates a "direct and immediate" dilemma for the parties.'" *El Dia*, 963 F.2d at 495 (quoting *W.R. Grace & Co. v. United States EPA*, 959 F.2d 360, 364 (1st Cir.1992)).

The customary ripeness analysis outlined above is, however, relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought. *E.g.*, *ACORN*, 835 F.2d at 739. Thus, while it is true that "the mere existence of a statute . . . is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms," *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1110 (D.C.Cir.1969), in the context of a First Amendment facial challenge, "[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim," *Martin Tractor*, 627 F.2d at 380. The primary reasons for relaxing the ripeness analysis in this context is the chilling effect that

potentially unconstitutional burdens on free speech may occasion:

> First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any *inhibiting chill*.

13A Wright, Miller & Cooper, Federal Practice and Procedure § 3532.3 at 159, *see also ACORN*, 835 F.2d at 740.

> Thus, our ripeness inquiry in the context of this facial challenge to New Mexico's election law statute focuses on three elements: (1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review. Our ripeness inquiry is not to be applied mechanically but rather, with flexibility, *Sierra Club*, 911 F.2d at 1416.

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499-1500 (10th Cir.1995) (underlined emphasis added and citations partially deleted).

On the issue of ripeness, it is important to note the types of activities the Plaintiffs want to conduct on the Property. Plaintiff Unitarian Church wants to pursue its objectives of spiritual enlightenment and social justice for all regardless of status such as race, gender, disability and sexual orientation, through "public dialogue and demonstrations." It contends some of its members have been previously escorted from unspecified CPB Property for such activities and therefore it reasonably fears they will be barred temporarily or permanently from use of the public easement. First Amended Complaint at ¶ 4.

Plaintiffs Unitarian Church and Mr. Axford also contend they will be forced to avoid the easement because using it will expose them to the sight of unwelcome governmentally-endorsed religious messages. First Amended Complaint at ¶ 4.

Plaintiff Utahns for Fairness wanted to use the Property in 1999 to hold a silent protest by encircling Temple Square with persons holding hands, including the disputed Property sold to CPB and now used as the Church Plaza. First Amended Complaint at ¶ 20 and Wood Dep. at 27 (attached to Pl.'s Opposition to Defendant's and Intervenor's Motions) (Mr. Wood is the member of plaintiff Utahns for Fairness who organized the protest) and Wood Dep. at 12 and 43 (CPB's Ex. 2).

Plaintiff National Organization of Women, (NOW), alleges it has demonstrated on the disputed Property in the past and wishes to do so in the future. First Amended Complaint at 6 and CBP's Ex. 68 (Malin Dep. at 6) (Ms. Malin was NOW's President/coordinator at the time of filing suit).

All of the Plaintiffs say they wish to use the Property to demonstrate, to espouse and to express their messages on an equal basis with the LDS Church. Plaintiffs have submitted evidence that they will be unable to do so because of the easement's restrictions.

Thus, this facial First Amendment challenge to the easement's bans against demonstrating, assembling, picketing, distributing literature, erecting signs or displays, using devices to project spoken messages or music is ripe because the bans create a "direct and immediate dilemma" for Plaintiffs that could place an "inhibiting chill" on their First Amendment right to free speech. *New Mexicans for Bill Richardson*, 64 F.3d at 1499-1500.

However, claims based upon the possible future enforcement of the "offensive, indecent, vulgar, lewd or disorderly speech, dress or conduct" provision of section 2.2 and the

"Right to Exclude Habitual Violators" provision of section 2.3 of the easement may not be ripe (*see* below).

VII Summary Judgment on First Amendment Claim

The parties agree that the sidewalks of Main Street were a public forum before the sale and as a result, the First Amendment protected the exercise of free speech thereon. See e.g. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420, (1988)("wherever the title of streets may rest, they have immemorially been held in trust for the use of the public" and finding streets don't lose character as public forums because they are in a suburb) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423(1939)); *U.S. v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (government may not transform the character of otherwise ordinary and publicly owned sidewalk by including it a statutory definition of publicly owned property that is not public forum). However, although all parties recognize that the sidewalks on the Property were formerly a traditional public forum, the parties strongly dispute the effect of the sale and reserved pedestrian easement on the previously-existing right to exercise First Amendment freedoms on the Property.

The CPB moves for Summary Judgment because it contends the public forum was lawfully closed when the sale of the Property closed the street, transformed the physical character of the Property and changed its principal use. In support, the CPB cites the Tenth Circuit's case *Hawkins v. City and County of Denver*, 170 F.3d 1281 (10th Cir.1999). The CPB contends that because the Property is now privately owned for a religious purpose, the Property is not a speech forum of any type subject to the constitutional restraints claimed by Plaintiffs.

The City moves for Summary Judgment on the basis that upon closure and sale the traditional public forum was altered, amended and vacated by changing the character, nature and use of the Property; that the retention of a

pedestrian easement did not preserve a public forum status where the agreement between the parties provided otherwise, and that private property is not burdened by public forum status. The City, like Intervenor CPB, relies upon the Tenth Circuit's *Hawkins* case. The City specifically addresses the freedom of association portion of Plaintiffs' complaint contending that there is no right to associate on private property belonging to another.

Plaintiffs move for partial summary judgment. They contend the undisputed facts show that the Property includes thoroughfare sidewalks that are a public forum, that the restrictions to which the City agreed cannot constitutionally be enforced, and, they seek a declaration that the restrictions are void. Plaintiffs contend this is a situation where the Property's status as a public forum continues despite the sale and the Warranty Deed's declaration that the sale doesn't create a public forum. Plaintiffs rely on the line of cases beginning with the "company town" case, *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (constitutional restrictions applied to a privately owned town which performed public functions "traditionally the exclusive prerogative of the State"). They also rely on such cases as *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (Court disregarded sham transfer of a City Park made to avoid prohibitions against racial segregation by government); *Citizens to End Animal Suffering v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D.Mass.1990) (public forum status of property remained despite its lease to a private corporation); and *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F.Supp.2d 1027 (D.Nev.1999) (sidewalk adjacent to casino on private property enjoyed public forum status).

The *Hawkins* case is the controlling legal authority. *Hawkins* instructs that government may close a First Amendment public forum by *inter alia*, selling the property,

changing its "physical character" or "principal use." 170 F.3d at 1287-88.

> Moreover the fact that the Galleria was constructed on what used to be a public street does not render it a traditional public forum. The government may, by changing the physical nature of the property, alter it to such an extent that it no longer retains its public forum status. *See ACLU of Nevada v. City of Las Vegas*, 13 F.Supp.2d 1064, 1074-75 (D.Nev.1998). As stated by Justice Kennedy in his *Lee* concurrence:
>
> > In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.

Hawkins, 170 F.3d at 1287 (citing Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699, 112 S.Ct. 2711, 120 L.Ed.2d 541 (1992) (challenge to Port Authority's ban on distribution of literature in airport)) (citations partially omitted).

This case is a stronger case than *Hawkins* for the closure of the former public forum because in this case the City sold the Property for its full market value while in *Hawkins* the City and County of Denver continued to own the property with only some small parts leased to private business.

It is undisputed in this case that the new property owner, CPB, now has total responsibility for the maintenance of the Property. This fact alone distinguishes the case from *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), cited by Plaintiffs for the proposition that a city can't "strip" the nature of a public forum and its protections of First Amendment rights by simply selling the Property or intending to end the public forum status. In *Evans*, the City at issue transferred record ownership, in the form of changing trustees, to a city park, while continuing to maintain and control the property. The Supreme Court held that if "the

municipality remains entwined in the management or control of the park, it remains subject to the constraints of the Fourteenth Amendment." 382 U.S. at 301, 86 S.Ct. 486. In this case, there is no allegation that the City continues to be involved in the maintenance [3] or the operation of the Property or other facts[4] to show *Evans* is applicable.

Turning to the issue of whether the public forum was closed by changing its physical character, Intervenor CPB has produced evidence that the physical character of the Property has been materially altered. It is undisputed that the old sidewalks were destroyed and the new walkways are different from, and are in different places than, the former city sidewalks. It is undisputed that the area where the walkways were is now in a landscaped ecclesiastical park. Upon entering the Church Plaza, the walking surface turns abruptly to distinct "reddish-grey granite pavers." CPB's Ex. 5 at ¶ 19. There are security bollards (posts) at each entrance to prevent motor traffic from entering the Church Plaza. *See* Bauer Aff. Ex. I. The bollards, street lights and garbage cans are identical to those used on the adjacent Temple Square and Church Administration Block and the nearby Conference Center. Ex. 4 at 30. The Church Plaza's entrances are marked by large planters placed on large stone structures containing waterfalls. *Id.* Exs. C, D, G, I & M and CPB Ex. 5 at ¶ 21. Unlike the cases where the walkways are identical to the public sidewalks surrounding and attached to them, in this case, as in *ACLU v. City of Las Vegas*, 13 F.Supp.2d 1064, (D.Nev.1998), all of the surroundings alert the pedestrian that

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[3] Cost of construction of the Church Plaza, its underground parking garage and the estimated $200,000 annual maintenance costs for the Church Plaza are the exclusive responsibility of the CPB as property owner. CPB Ex. 4 at ¶ 23.

[4] Further, as noted below, the Property was purchased for and is operated as an ecclesiastical park, designed and used to further religious purposes. This distinguishes the Property from the traditional public park-like nature of the property in *Evans* or *Faneuil Hall*.

he or she has entered an enclave that is distinct from the public area. As in *ACLU*, there is distinctive paving, special lighting, and landscaping. Further, it is undisputed that there are identifying signs at the entry of the Church Plaza and there are religious statuary and symbolism throughout the Church Plaza, all of which alert the pedestrian to the religious theme of the area. *E.g.* CPB Ex. 4 at ¶¶ 28-30 and Ex. 5 at ¶¶ 20-22.

It is undisputed that a major component of the Church Plaza is the large reflecting pool designed to reflect and enhance the Salt Lake LDS Temple (Temple), a building of religious purpose which is located on the adjacent Temple Square. Ex. 5 at 27. There are grade elevations, grassy areas, and distinctive plantings distinguishing the Church Plaza from nearby areas. *Id.*

In opposition, Plaintiffs have produced evidence that the Church Plaza was designed with pedestrian traffic in mind. Plaintiffs' evidence includes the pictures and drawing attached to the Affidavit of Robert Bauer showing unblocked pedestrian access along the North to South edges of the Church Plaza, although the access curves gently around the reflecting pool and planters. However, these pictures also show clearly the "enclave" nature of the Church Plaza. As revealed in those pictures, any pedestrian could not fail to understand that he or she is not walking on the public sidewalk of that part of the City but is instead crossing a private Church Plaza. *See Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 273 (Colo.1997) (holding governmentally owned sidewalks leased by private entity were public forum where the "architectural design and layout of the sidewalks and walkways fail to indicate to the public that they have entered a private area.").

Where the undisputed facts show the nature of the Property has been changed so that the Church Plaza is clearly distinguishable from the surrounding streets and sidewalks,

the Plaintiffs have not raised an issue of fact that its physical character has not been so materially changed as to end its status as a public forum sidewalk.

Hawkins also holds that a public forum can be closed by changing its principal use. In this respect the Intervenor's and Defendant's evidence is unchallenged. Where as before there was a road and vehicular traffic, there is now only pedestrian traffic. The Intervenor's statistics are undisputed on the use of the Church Plaza as an ingress and egress for the buildings on the adjacent, and privately owned, blocks into which the Church Plaza now flows. Persons using the Church Plaza include persons entering the Temple (4,500 a day), persons employed at various LDS Church-owned office buildings on the Church Administration Block (145 a day at Church Administration Building, 100 a day at Relief Society Building, 3,100 a day at Church Office Building; 600 employees at Joseph Smith Building) or visiting various LDS Church-owned buildings in the complex. (600 daily visitors/tourists at Church Office Building; 500 daily diners and 1200 daily film-goers at the Joseph Smith building, 650 daily diners at Lion House and 650 daily visitors at the Beehive House). CPB's Ex. 62 at ¶ 5. The Intervenor's evidence is unchallenged that these uses constitute the "vast majority" of pedestrian use of the Church Plaza. Ex. 20. In addition, as an adjunct to and now major entrance to Utah's most-visited tourist attraction, Temple Square, the Church Plaza provides egress and ingress (but not sole egress and ingress) for tourists who will visit Temple Square but who will not enter the Temple. One of the former entrances to Temple Square was closed, and a new east opening in the 12 foot high wall surrounding Temple Square links the Church Plaza directly to the formerly inaccessible inner courtyard of the Temple. CPB's Ex. 5 ¶¶ 25 and 26. In addition to allowing pedestrian traffic to enter Temple Square, the opening allows the Temple to reflect in the new pool unobstructed by the tall wall that otherwise surrounds Temple

Square. CPB's Ex. 5 ¶¶ 25, 27-28. Further to the north and west of the Property is a block containing the Church Conference Center. This Center seats 21,000 and has over 15,000 weekly visitors. CPB's Ex. 5 ¶ 7 and CPB's Ex. 62 at ¶ 5.

The Church Plaza allows access of pedestrians along many east-west paths enabling free-flow of persons between sites at Temple Square and those at the Church Administration Block. There are no clear boundaries marking the entries of the paths back and forth between the Church Plaza and the Church Administration Block. Ex. 5 ¶¶ 17, 33.

The Intervenor's evidence is also undisputed that the Church Plaza now serves various functions incompatible with its former functions as a city street and city sidewalks. As noted above, the signs and religious statuary and displays signal to the pedestrian that the Church Plaza is a religious enclave. The Property's new functions include spreading the LDS Church's religious message, celebrating religious themes, celebrating the "majesty and beauty" of the Temple, building good will for the LDS Church, enhancing the experience of couples married in the Temple by providing them a "spectacular" setting for wedding pictures, establishing an association between the LDS Church and an atmosphere of beauty and serenity, and preventing urban decay near the LDS Church's sacred sites and its world-wide headquarters. Ex. 4 ¶ 24 and 26.

In response to all the above-discussed undisputed evidence, Plaintiffs offer the conclusory statement that the Property remains a throughway. However, because Plaintiffs provide no information on the relative number of persons so using the Property as a throughway, the evidence is undisputed that the principal uses of the Property have changed.

In *Hawkins*, the area in question no longer formed part of the City's automotive, bicycle or transportation grid and was

not generally, although it was occasionally, used as a throughway. In this case, the Church Plaza is no longer part of Salt Lake City's automotive or other motor vehicle transportation grid and bicycles can traverse the Property only if "walked." Although the Property remains part of the pedestrian transportation grid via the easement, the undisputed facts show the Property's physical character and principal uses have been altered to such an extent that it is clearly a walkway through an enclave area and not part of the City's public sidewalks.

Where the undisputed evidence shows the public forum character of the Property has been closed by selling the Property, changing its physical character, and changing its principal use, under *Hawkins*, it is no longer a public forum.

Plaintiffs contend that under the cases *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F.Supp.2d 1027 (D.Nev.1999) and *Citizens to End Animal Suffering v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D.Mass.1990), the property retains its character as a public forum because the private property owner is performing a public function of maintaining sidewalks. As the parties recognize, there is a narrow exception to the rule announced in *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 521, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), that the First Amendment guarantee of free expression has "no part to play" in a case involving picketing on private property because a privately owned and self-contained shopping mall is not the functional equivalent of municipality within the meaning of *Marsh, supra*. That exception applies where the private party is performing a public function that has been traditionally performed exclusively by the municipality, namely the maintenance of thoroughfare sidewalks. This was the exception relied upon in *Venetian Casino Resort*, 45 F.Supp.2d 1027 and *Faneuil Hall Marketplace*, 745 F.Supp. 65.

Venetian Casino is not applicable because of a dispositive fact in that case; namely, the nature of the sidewalk there as parallel to a public road and to "facilitate pedestrian traffic in daily commercial life *along the Las Vegas Strip*" as well as provide access to the casino. 45 F.Supp.2d at 1034-35 (underlined emphasis added). The sidewalk at issue in *Venetian Casino* paralleled the busy state highway known as the "Las Vegas Strip." The sidewalk was moved sideways from the state-owned property to private property in order to meet twin objectives of building a new casino and widening the highway. The casino agreed to build and keep open a sidewalk on its own property. The temporary sidewalk built on casino property looked somewhat different from the public sidewalks which it adjoined, but was otherwise indistinguishable in form and function. The *Venetian Casino* court held that "[t]horoughfare *sidewalks parallel to the main public street* in a city, that allow citizens to move from one part of the city to the next, have traditionally been exclusively owned and maintained by the government." 45 F.Supp.2d at 1034 (underlined emphasis added). The casino's sidewalk was therefore subject to the "very rare" exception announced in *Marsh, supra*, of imposing constitutional restraints on private property because the property owner is performing a traditional public function. *Id.* at 1035. The *Venetian Casino* court declined to grant a TRO preventing labor union protests on the sidewalk holding that it was a public forum despite being on private land. Further, the *Venetian Casino* court noted that the casino's sidewalk, unlike the Property at issue in this case, was not a specific destination in and of itself.

In this case, there is no longer a main street, or any street, on the Property. The street has been eliminated and a completely different use made of the Property. There is no daily commercial life along a road to facilitate. Instead, there is an ecclesiastic park, a destination in and of itself for picture taking, for viewing statuary and other religious displays, and

similar activities. Because the physical character and principal purpose of the Property have been so altered, the maintenance of a pedestrian easement across the Property is not the maintenance of a public function that subjects the private property owner to constitutional limitations that constrain municipalities.

In *Faneuil Hall*, the area at issue was formerly a historic and important public forum. The City owned the property but leased it under a long term lease with a public easement. *Faneuil Hall* is distinguishable in several respects: the "City continue[d] to own the land in fee simple,"[5] there were no discernable boundaries between the area and the nearby public areas, Faneuil Hall and Square were adjacent to the disputed property and were themselves historically important public forums that at the time of the case remained public areas, and, the lessor had a private security force that arrested the protestors. 745 F.Supp. at 70-71 and n. 10. The *Faneuil Hall* court held that if the City had simply authorized the lessor "to maintain the public walkways, its discharge of that duty might not be state action." 745 F.Supp. at 71-72. However, because the lessor's security force decided who could use the easement and physically prohibited protestors from using the area,[6] its actions were held to be more akin to that of a policeman, a function that has traditionally been the exclusive domain of the state. *Id.*

The Intervenor here is distinguishable from the lessor in *Faneuil Hall* because Intervenor is not exercising police power over who uses the easement. Instead, its security policy clearly shows that the City police need to be called to remove anyone. See CPB's Ex. 4 ¶ 32 and Pl.s' Ex. 20 at

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[5] A fact the *Faneuil Hall* court held of import to the "symbiotic relationship" test but not to the public function test. 745 F.Supp. at 72.

[6] The private security officers arrested, handcuffed and detained the protestors at their security offices. 745 F.Supp. at 67.

§ 2(c) ("West Church Plaza Security Policy") (If a person violating the restrictions refuses a request to discontinue conduct or leave, "the Salt Lake City Police Department will be summoned, unless the nature of the conduct requires immediate lawful intervention by Church representatives, such as when the person presents an imminent danger to himself, others, or property.").

The same reasons that distinguish *Faneuil Hall* and *Venetian Casino* also distinguish other cases cited by Plaintiffs. In *Jackson v. City of Markham, Ill.*, 773 F.Supp. 105 (N.D.Ill.1991), the sidewalk at issue was on state property, maintained by public funds and paralleled the public highway in the traditional manner of public sidewalks, all facts distinguishing it from this case.

In *Thomason v. Jernigan*, 770 F.Supp. 1195, 1200 (E.D.Mich.1991), the public sidewalk easement in question was parallel to a cul-de-sac built on a public street easement over private property. In *Thomason* it was also undisputed that the sidewalks were indistinguishable in form and function from the nearby public sidewalks to which they were attached. Further, in *Thomason*, the court held that the City's action could be invalidated because the vacation of the public easement was for the express purpose of eliminating a public forum on the sidewalk on private property used by a single group of protestors. The facts of this case show the public forum status of the Property was eliminated for all groups of potential public protestors, regardless of the content of their messages. Further, the *Thomason* court's position that a city council's action can be invalidated if it destroys a public forum is incompatible with *Hawkins*. In *Hawkins*, the Tenth Circuit held that a public forum could be cut off by a variety of means, including its sale.

The Court finds by purchasing the Property and creating thereon a religiously oriented pedestrian plaza connecting two privately owned blocks of property, the CPB sufficiently

changed the physical character and principal use or function of the Property so as to terminate its status as a public forum.

Although the Property is not a public forum, Plaintiffs still contend that the easement is a public property right to which constitutional protections apply. *Hawkins* enumerated designated public fora and nonpublic fora as the two other types of government property subject to constitutional protections.

Intent is necessary to establish a designated public forum. *Hawkins*, 170 F.3d at 1286. There is no such intent in this case and in fact there is just the opposite, an express acknowledgment between the private buyer and the governmental seller that the easement is not intended to create a public forum of any kind.

"Nonpublic fora" include any remaining government property that is not by tradition or designation a forum for public use. The undisputed fact is that the only remaining Property interest of the City, and therefore the public use, are extremely limited easements. The pedestrian easement is itself extremely limited even without the §§ 2.2 and 2.3 restrictions and conditions because it authorizes "pedestrian access and passage only."

Intervenor CPB contends that a limited pedestrian easement is not a sufficient property right belonging to the government to constitute a nonpublic forum within the meaning of *Hawkins*.

Plaintiffs contend that it is and move for partial summary judgment. They contend that even if the property is no longer a public forum, they seek declaration that the easement is a public property right and that the easement's restrictions are not reasonable and violate the First Amendment and the Due Process Clause because they restrict speech according to viewpoint. Plaintiffs note the easement expressly recognizes the property owner's right to distribute literature, erect signs

and displays and project messages and music, all activities banned for users of the pedestrian easement. Easement Section 2.2. Plaintiffs rely on *ACLU of Nevada v. City of Las Vegas*, 13 F.Supp.2d 1064 (D.Nev.1998), a preliminary injunction case where the court found the ACLU was not likely to prevail on its claim that an enclosed downtown mall that covered part of Las Vegas' downtown was still a public forum; yet the court held that the ACLU was likely to prevail on its claim that the mall was a non-public forum and restrictions placed on all picketing except labor disputes were not rationally related to the government interest. As evidence the restrictions are not rationally related, Plaintiffs point to the fact that the landowner is allowed to pass out literature, erect signs, have a kiosk, etc., while pedestrians are not.

The cases cited for restrictions on use of non-public fora involve property owned and/or controlled by the government or a governmental agency and include a broad range of property types. *See Cornelius v. NAACP*, 473 U.S. at 806, 105 S.Ct. 3439 (the CFC, the federal employees charitable fund-raising program administered by the federal government is nonpublic forum); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (airport terminal owned by port authority is non public forum); *United States v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (sidewalk used for access to post office is nonpublic forum).

Having considered the undisputed evidence, the court finds that the limited pedestrian easement is a governmentally owned property right that could be considered a nonpublic forum. As such the court must find that the restrictions are rationally related to a legitimate governmental purpose. The following rules apply to nonpublic fora:

> In a nonpublic forum, the government has much greater latitude to restrict protected speech. The law draws no distinction between content-neutral and content-based

> restrictions in a nonpublic forum. Provided the restriction is reasonable in light of the purpose served by the forum and is "not an effort to suppress expression merely because public officials oppose the speaker's view," it does not violate the First Amendment. *[Arkansas Educ. Television Commission v.] Forbes*, [523 U.S. 666], 118 S.Ct. at 1641 [, 140 L.Ed.2d 875 (1998)]; *see also, e.g., Lee*, 505 U.S. at 679, 112 S.Ct. 2701; *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439. For a court to uphold a speech restriction as reasonable, "it need not be the most reasonable or the only reasonable limitation." *Lee*, 505 U.S. at 683, 112 S.Ct. 2701 (quoting *United States v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion)). Furthermore, "[i]n contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439.

Hawkins, 170 F.3d at 1287.

In this case the types of activities that Plaintiffs wish to engage are absolutely prohibited on the easement. No one entering the property pursuant to the pedestrian easement may engage in protest, pickets, distribution of materials, or like actions. Thus, the restrictions are content-neutral. The restrictions are rationally related to the legitimate governmental interest because such activities are incompatible with the property right held by the City, which is merely for "pedestrian access and passage only."

Plaintiffs complain that the CPB may conduct activities prohibited under the easement. However, any conduct of such activities by the CPB is in its capacity as the property owner and is unrelated to use of the easement.

In making its determination that the easement's restrictions on the use of the easement as a nonpublic forum are reasonable in relation to the purpose served by the forum, the

court places major reliance on balancing the rights of the private property owner in controlling the usage of its property against the claimed residual First Amendment rights the Plaintiffs wish to exercise on the City's pedestrian easement over the Property. That property owner, the CPB, paid what is undisputedly full market value for the property—a price that was not diminished for the value of the pedestrian and other easements. The CPB has expended considerable monies to alter the property for a specific purpose, the same purpose for which it was sold by the City and acquired by the CPB. The court cannot find that the pedestrian easement, any more than the view corridor or the utility easements, is the kind and quality of a governmentally-owned property right that would allow members of the public to interfere with or harm the purpose for which the private property owner acquired the Property, built the Church Plaza and maintains the Church Plaza. Although strict incompatibility between the nature of the speech and the functioning of the nonpublic forum (the pedestrian easement) is not mandated to uphold restrictions,[7] such incompatibility is present in this case. The City's interest in the easement is for the limited purpose of allowing pedestrians access to and passage over the Property. Prohibitions that prevent uses of the easement other than pedestrian passage are rationally related to maintaining the purpose of a pedestrian easement—passage over property. Prohibiting any protests, picketing, leafleting, erecting displays, using loud speakers to project music and the like on the limited easement is reasonable in light of the purpose of the nonpublic forum as a pedestrian easement.

This is especially true on the facts of this case where it is undisputed that the public still has unrestricted access to the extensive public sidewalks that border the Church Plaza on two sides as well as bordering the adjacent Temple Square

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[7] *Hawkins*, 170 F.3d at 1287 (quoting *Cornelius*, 473 U.S. at 808, 105 S.Ct. 3439).

and Church Administration Block.[8] In *Hawkins*, the Tenth Circuit held that its conclusions on the reasonableness of the restrictions at issue were "bolstered by the fact that ample alternative channels for communications remain available to" the plaintiffs therein because they could have, by the alternative means reached a large portion of the persons using the nonpublic forum. 170 F.3d at 1291 at n. 7. The nearby Conference Center is also entirely surrounded by public sidewalks which remain open to the exercise of traditional free speech activities. *See* CPB Exs. 4 at ¶ 31 and 20 ¶ 4 (In year 2000, protests shifted from the south gate of Temple Square to North Temple street near the Conference Center because protestors locate themselves in the vicinity of the largest audience).

In addition, there is a rational government interest in the City's being able to obtain pedestrian easements in the future. For example, the City has a pedestrian easement over private property for the Bonneville Shoreline Trail in the City's foothills. CPB's Ex. 14. If pedestrian easements granted to the City burdened the property owners with the requirement of allowing pedestrians the right to congregate on the burdened property to protest, picket, leaflet, broadcast messages/music over loud speakers and other activities incompatible with access and passage, it would seriously impair the City's ability to obtain such easements for the benefit of the public.

Moreover, under the circumstances of this case as established by the undisputed record before the Court, there exists no First Amendment right to associate on private property belonging to another.

Lastly, to the extent that Plaintiffs' claims are based upon actions arguably prohibited by the easement's restrictions against "offensive, indecent, obscene, vulgar, lewd or

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[8] *Compare* Ex. 5 ¶ 36 and Cordova Aff. ¶ 26.

disorderly speech, dress or conduct" and the right under the easement to exclude habitual violators, Plaintiffs have not claimed they want to engage in such conduct and have not shown that these provisions are likely to be enforced against them. Accordingly, there is no "direct and immediate dilemma" for Plaintiffs that could place an "inhibiting chill" on their First Amendment rights. Without the threat of enforcement of these provisions against Plaintiffs, a decision at this time regarding those provisions would entangle this court in an "abstract disagreement" about the provisions and their applicability. Thus, any such claims based on those provisions must await the time they are presented in "clean-cut and concrete form." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d at 1499-1500.

Under the undisputed facts, the Property is not a First Amendment forum of any type and thus is not subject to the constitutional constraints claimed by Plaintiffs. Accordingly, Plaintiffs' Motion for Summary Judgment on their First Claim for Relief under the First Amendment will be denied and Defendant City's and Intervenor CPB's Motions for Summary Judgment on these claims will be granted.

VIII Summary Judgment on Establishment Clause Claims

Plaintiffs move for summary judgment on their claim that the function of interpreting and enforcing the easement is a "traditional government function" and that by delegating that function to the landowner, "the LDS Church," the City violates the Establishment Clause. Plaintiffs rely on *Faneuil Hall* dicta to the effect that the power to decide who can use a public easement is an exclusive state function and therefore subject to constitutional scrutiny whether or not delegated to a private party, 745 F.Supp. at 72, and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) (Boston's statute giving churches, in effect, veto power over issuance of liquor licenses, a traditional state function violated Establishment Clause).

The City and Intervenor move for summary judgment on the Establishment Claim on the basis that there is no evidence of collusion in favor of, or favoritism for, the LDS Church, the sale of the property meets the *Lemon* test for determining that it did not violate the Establishment Clause and there is no unconstitutional delegation of a traditional government function to a church.

Establishment Clause case law is notoriously confused and difficult. A recent case from the Tenth Circuit, *Bauchman v. West High School*, 132 F.3d 542 (10th Cir.1997), acknowledges this difficulty and sets forth the applicable law:

> The First Amendment states the government "shall make no law respecting an establishment of religion." This prohibition extends to state government, including the Utah public schools, by operation of the Fourteenth Amendment.
>
> Determining whether Ms. Bauchman has alleged facts sufficient to support her claim that defendants have violated this prohibition is not an easy task, as there is no bright line standard we can apply. The United States Supreme Court repeatedly has recognized *there can be no precise Establishment Clause test capable of ready application*, and therefore has resisted confining such sensitive analyses to "any single test or criterion." *Lynch v. Donnelly*, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). . . . . To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective. Indeed, many believe the Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger v. University of Virginia*, 515 U.S. 819, 861, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (Thomas, J. concurring), and in need of "[s]ubstantial revision." *County of Allegheny v. American Civil Liberties Union*,

492 U.S. 573, 656, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Kennedy, J. concurring in part and dissenting in part).

Our attempt to glean an appropriate standard for this case from existing, muddled Establishment Clause precedent begins with *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which is recognized as the benchmark case for Establishment Clause analysis. Applying *Lemon*, government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement. 403 U.S. at 612-13, 91 S.Ct. 2105.

Beginning in the 1980s, however, the *Lemon* analysis came under vigorous attack by Justices and commentators alike.

* * * * * *

Acknowledging *Lemon's* weaknesses, Justice O'Connor seized the opportunity in *Lynch v. Donnelly* to draft a concurring opinion encouraging the Court to refine the *Lemon* analysis to focus more on whether the government is "endorsing" religion. 465 U.S. at 687-94, 104 S.Ct. 1355. Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that "religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 592-93, 109 S.Ct. 3086; *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality); *Lynch*, 465 U.S. at 687-94, 104 S.Ct. 1355 (O'Connor, J., concurring). Recent cases suggest the purpose component of the endorsement test

should evaluate whether the government's "actual" purpose is to endorse or disapprove of religion (*i.e.*, did the government intend to endorse or disapprove of religion); *Edwards*, 482 U.S. at 585, 107 S.Ct. 2573; *Jaffree*, 472 U.S. at 56, 105 S.Ct. 2479 (adopting Justice O'Connor's revision of the purpose component from *Lynch v. Donnelly*). The effect component, on the other hand, should evaluate whether a "reasonable observer," aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval. *Capitol Square*, 515 U.S. at 779-81, 115 S.Ct. 2440 (O'Connor, J., concurring). Justice O'Connor's "endorsement test" is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims. *See* James M. Lewis & Michael L. Vild, A Controversial Twist of Lemon: The Endorsement Test as the Establishment Clause Standard, 65 Notre Dame L.Rev. 671 (1990). It would be wrong, however, to suggest the Court is unanimous in its adoption of the endorsement test. Moreover, even the Justices who have adopted the endorsement test do not agree on how it should be applied. *Id.* at 687-88. For example, although the Court has indicated a failure to satisfy the purpose component of the endorsement test alone is sufficient to invalidate government action, *Edwards*, 482 U.S. at 585, 107 S.Ct. 2573; *cf.*, *id.* at 610, 107 S.Ct. 2573 (Scalia, J., dissenting) (questioning the premise that government action can be invalidated on the basis of motivation alone, without regard to the effect), the Court rarely has decided cases based solely on the purpose component. *See Jaffree*, 472 U.S. at 75, 105 S.Ct. 2479 (O'Connor, J. concurring). When it has, the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry. *See*

Edwards, 482 U.S. at 613, 107 S.Ct. 2573 (Scalia, J., dissenting) (citations omitted); *Lynch*, 465 U.S. at 680, 104 S.Ct. 1355 (citations omitted). To the extent the Court has delved into the government's subjective intent in its evaluation of the actual purpose, such approach has been openly condemned by two members of the present Court—Chief Justice Rehnquist and Justice Scalia. *Edwards*, 482 U.S. at 610, 107 S.Ct. 2573 (Rehnquist, C.J, and Scalia, J., dissenting). According to Justice Scalia, who has proposed eliminating the purpose component altogether, discerning the government's subjective intent is "almost always an impossible task . . . [t]o look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Id.* at 636-37, 107 S.Ct. 2573. *Consequently, despite Sisyphean efforts, application of this component yields unprincipled results. Id.* at 636, 107 S.Ct. 2573; *Jaffree*, 472 U.S. at 112, 105 S.Ct. 2479, (Rehnquist, J., dissenting).

Having struggled to meaningfully apply the purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree *it is an unworkable standard* that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect. Nevertheless, the uncertainty surrounding the present Court's position regarding the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon*, when evaluating Ms. Bauchman's Establishment Clause claim.

Bauchman v. West High School, 132 F.3d at 550-52 (underlined emphasis added and citations partially omitted).

Plaintiffs appear to argue that *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), trumps the *Lemon* test. In *Larkin*, the Supreme Court held that independent of the first of the *Lemon* criteria (secular purpose), "by delegating a governmental power to religious institutions," the statute at issue "inescapably implicates the Establishment Clause" and therefore was declared void. The statute at issue in *Larkin* gave what amounts to veto power to churches over the issuance of liquor licenses. The Supreme Court found by giving churches a standardless veto power it was giving important discretionary power to be delegated to or shared with churches in violation of the Establishment Clause. 459 U.S. at 122-23, 103 S.Ct. 505.

Plaintiffs couple the *Larkin* ruling with the following language from *Faneuil Hall* for the proposition that deciding who may use an easement is a governmental function and under *Larkin*, it is a violation of the Establishment Clause for the City to have delegated the function to a church.

> Indeed, the power to decide who can use a public easement goes beyond even that of a policeman. Unlike the policeman who merely executes decisions of policy, defendant here is actually making those policy decisions. Defendant's role is thus more like that of a legislature, which is even more clearly an exclusive state function. *The essential purpose of the easement here is to ensure public access to the Marketplace. The exercise of control over the public's right to use the easement is subject to constitutional scrutiny, whether employed directly by the State or through delegation to a private party.*

Faneuil Hall, 745 F.Supp. at 72 (underlined emphasis added).

The Plaintiffs contend that the Warranty Deed gives the power to decide who uses the public to the CPB in several respects: by being able to decide who is offensive, lewd, etc.,

and therefore may be excluded under § 2.2 and by giving the power to "lawfully" exclude habitual violators of this standardless criteria under § 2.3

Intervenor CPB distinguishes *Faneuil Hall* because, as noted above, it is not exercising police power over who uses the easement. Instead, its security policy clearly shows that the City police need to be called to have anyone removed and if the police decline to move the person the CPB has its ordinary remedies available under state law. Pl.s' Ex. 20 at § 2(c) ("West Church Plaza Security Policy") and CPB's Ex. 5 ¶ 33. Defendant City concurs in this position.

The CPB submits cases in support of its position that the enforcement of easements is not a traditional governmental function but rather is a matter left to private enforcement in state court. *E.g. State ex rel. Branton Family, L.P. v. Jackson County*, 880 S.W.2d 571 (Mo.App.1994) (dispute over proposed use of easement).

The Court rejects Plaintiffs' argument that under *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), the City violated the Establishment Clause by delegating to the LDS Church an exclusive governmental function. The alleged function at issue here is the right of the CPB under the Deed to exclude persons who exceed the scope of the pedestrian access easement. Section 3 of the Warranty Deed, providing that Grantee may use all lawful means available to owners of private property to prevent any uses of the easements which are contrary to the provisions of the easement, is an acknowledgment that the landowner CPB is not granted any special status in the enforcement of the restrictions of the easements. Further, it is undisputed that the landowner's policy is to call the City police if the landowner finds it necessary to exclude persons.

As noted above, *Faneuil Hall* is distinguishable on its facts. In that case, private security police arrested demonstrators and physically excluded them from the property.

Here there exists no genuine issue of material fact that except in cases where the nature of the conduct requires immediate lawful intervention "such as when the person presents an imminent danger to himself, others, or property"—the Property owner's policy is that it will call City police when an issue of enforcement or exclusion arises. See CPB's Ex. 60 (West Church Plaza Security Policy). Section 3 of the Deed provides the CPB may use all lawful means available to the owners of private property to prevent uses of the easement that are contrary to the rights granted in the Deed. Thus, it has not been delegated any exclusive state function or any special status or rights. In enforcing the limits of the easement over its property or in protecting any other of its property rights, the CPB has only those rights and powers which other private property owners enjoy. Having rejected Plaintiff's theory under their reading of *Larkin* and *Faneuil Hall*, the court turns to the traditional *Lemon* test.

Under the *Lemon* test, a government act does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement of church and state. *Lemon* 403 U.S. at 612-13, 91 S.Ct. 2105. The Court finds that, on the undisputed facts before it, each prong of the *Lemon* test is met.

The secular purposes of the City's sale of the property to the CPB are numerous and undisputed. They are set forth in the Planning Commission's Report, CPB's Ex. 12, at 4-8 and 12. (Setting forth 17 broad secular purposes).

Among the secular purposes is the enhancement of the City's, and the State's, major tourist draw. The figures produced by the CPB are undisputed. Those figures show that literally millions of persons visit Temple Square each year, so many that it was nearly physically impossible to fit the crowds on the Temple Square grounds during the Christmas season when lights on Temple Square are a very popular

attraction. CPB Ex. 26 ¶ 26. In the past, 3.5 to 9 million persons visited Temple Square and nearby LDS Church sites each year and in the near future those numbers are expected to increase dramatically. CPB Exs. 4 at ¶ 8 and Ex. 18 Kemp Aff. ¶ 4.

To state a claim under the effects component of the endorsement test, a plaintiff must allege facts indicating the sale has a principle or primary effect of advancing or endorsing religion.

> United States Supreme Court precedent "plainly contemplate[s] that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683, 104 S.Ct. 1355. However, not every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid. *Id.* Thus, as noted above, the Constitution does not forbid all mention of religion in public schools. The Establishment Clause prohibits only those school activities which, in the eyes of a reasonable observer, advance or promote religion or a particular religious belief. This is an objective inquiry, not an inquiry into whether particular individuals might be offended by the content or location of the Choir's performance, or consider such performances to endorse religion. *Gaylor*, 74 F.3d at 217.

Bauchman, 132 F.3d at 555.

In this case, because the purchaser was the temporal arm of a church, there would naturally be a benefit to that church. However, incidental benefits to a religion from governmental action do not invalidate that action. *Bauchman*, 132 F.3d at 555. The CPB was the adjacent landowner and the owner of the subsurface rights. As such, under City policy it is the only party to whom the City would have sold the surface rights. Cordova Aff. ¶ 23. The closure and sale of streets and

alleys is common in the City, including for purposes such as the promotion of tourism, and such sales have been made to other churches. *Id.* at ¶ 24 and Ex. C; Meeker Aff. Ex. B (City Council's street closure policy); Patterson Aff. ¶¶ 15 and 16 and Ex. E (list of City's street closures 1970 through 1999).

A reasonable observer aware of the context, purpose and history of city planning in Salt Lake City, "including the historical tension between the government and the Mormon Church," 132 F.3d at 555, the historic presence of LDS Church property in the center of the City, and the millions of annual visitors to such LDS Church property, would not find that the result of the City's acceptance of a full market value price for the surface rights to the Property had the principal or primary effect of advancing religion. Rather, a reasonable observer would find the principal or primary effects of the sale are those stated secular purposes the City expressed when it made the sale, including the enhancement of its major tourist attraction.

The entanglement analysis typically is applied to circumstances in which the state is involving itself with religious activity or religious institutions. *See Florey v. Sioux Falls School Dist., No. 49-5,* 619 F.2d 1311, 1318 (8th Cir.1980) (school board's policy on Christmas program). In this case the City has not entangled itself in the recognized religious activities of the CPB or the LDS Church by selling the CPB real property for full market value. To have refused to make an otherwise justified sale solely because the purchaser was the temporal arm of a religious organization or because the Property would be used by its new owner for religious purposes would have shown perhaps unconstitutional hostility to religion. This is especially true as other City streets or alleys have been closed and sold to other organizations, including other churches.

Further, the court agrees with the CPB's contention that to try to promulgate and enforce speech restrictions against the property owner's use of its own property to communicate its religious message would excessively entangle the City in the property owner's exercise of its freedom of religion. Consequently, the court perceives no state involvement with religious activity or excessive entanglement of church and state under the undisputed facts of this case.

Thus, under the *Lemon* test, there is no Establishment Clause violation. The Utah Constitution's establishment clause is also not violated on the undisputed facts.

Finally, the court finds no evidence in the record to support Plaintiffs' position that the events leading up to the sale somehow violated the Establishment Clause.

Accordingly, Plaintiffs' Motion for Summary Judgment on this claim should be denied and Defendant City's and Intervenor's Motions for Summary Judgment on the Establishment Clauses of the U.S. Constitution and the Utah Constitution will be granted.

IX Summary Judgment on Equal Protection Claims

The City and the Intervenor move for Summary Judgment on this claim claiming that Plaintiffs have failed to show that the sale denied the equal protection of the law.

The Equal Protection Clauses of the U.S. Constitution and the Utah Constitution protect against discrimination amongst similarly-situated individuals. *Malan v. Lewis*, 693 P.2d 661 (Utah 1984) and *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

Because the court has determined that the property is not a public forum, the classifications need only be rationally related to a legitimate government interest. *ACLU v. City of Las Vegas*, 13 F.Supp.2d 1064, (D.Nev.1998).

In this case, there is no denial of Equal Protection because in a nonpublic forum, the property owner's use of its property for speech purposes is not similarly situated to the use of pedestrians under an easement limited to "pedestrian access and passage only."

No other persons are allowed to use the easement for the prohibited activities in which Plaintiffs wish to engage. The fact that the property owner can engage in activities on its own property, and that the easement acknowledges that right, does not mean that the property owner is treated differently under the easement—its right to use the property flows from ownership, rather than from use under the easement and, therefore, the different treatment does not cover similarly-situated individuals.

Further, the court has already found, *supra*, that the restrictions in the easement are rationally related to the legitimate governmental interests in the easement.

The Intervenor is correct that the Plaintiffs admit they have no direct evidence of intentional discrimination in connection with their equal protection claims. Where there is no evidence of intentional discrimination and no similarly-situated class being treated differently, the court need not examine the history of the sale under the test for determining whether invidious discriminatory purpose was a motivating factor in the governmental action set forth in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

Further, to the extent that the Equal Protection claim seeks to review the disputed "offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct" provision of § 2.2 or the "Exclude Habitual Violators" provision of § 3, Plaintiffs' challenge is not ripe for the reasons stated above in connection with the Free Speech challenge to such a claim.

There are no material issues of fact on the Equal Protection Claims under the federal or Utah Constitutions. Based upon the foregoing, the Court finds that Plaintiffs have failed to come forward with issues of facts upon which a reasonable finder of fact could find in their favor on their equal protection claim. Accordingly, Plaintiffs' Motion for Summary Judgment on this claim will be denied and Defendant City's and Defendant Intervenor's Motion for Summary Judgment on the Equal Protection claim under the U.S. Constitution and the Utah Constitution will be granted.

X Conclusion and Order

Based upon the foregoing, it is therefore

ORDERED that Defendant Salt Lake City Corporation's and Intervenor CPB's Motions for Summary Judgment on Plaintiffs' First, Second and Third Claims for Relief, including Plaintiffs' supplemental State constitutional claims, are GRANTED. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4111

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, *et al.*,
Plaintiffs-Appellants,

v.

SALT LAKE CITY CORPORATION,
a municipal corporation,
Defendant-Appellee,

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
Defendant-Intervenor-Appellee,

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,
Amici Curiae.

ORDER
Filed November 14, 2002

Before SEYMOUR, McWILLLIAMS and HENRY, Circuit Judges.

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

Affects Sidwell Nos.
08-36-479-001
09-31-352-001
09-31-352-003
09-31-352-008
09-31-352-009

SALT LAKE CITY ORDINANCE
No. 28 of 1999

(Closing a portion of Main Street between
North Temple and South Temple Streets)

AN ORDINANCE CLOSING A PORTION OF MAIN STREET LOCATED BETWEEN NORTH TEMPLE AND SOUTH TEMPLE STREETS, PURSUANT TO PETITION NO. 400-98-79.

WHEREAS, the City Council of Salt Lake City, Utah, finds after public hearings that the City's interest in the portion of the street described below, is not necessary for use by the public as a street and that closure of this portion of the street will not be adverse to the general public's interest; and

WHEREAS, the title to the closed portion of the street shall remain with the City until sale for fair market value or the receipt of equivalent value in accordance with Salt Lake City Code Chapter 2.58;

NOW, THEREFORE, *be it ordained by the City Council of Salt Lake City Utah*:

SECTION 1. That a portion of Main Street located between North Temple and South Temple Streets, which is the subject of Petition No. 400-98-79, and which is more particularly described on Exhibit "A" attached hereto, b., and the same hereby is, closed and declared no longer needed or available for use as a street.

SECTION 2. *Reservations and Disclaimers.* The above closure is expressly made subject to all existing rights-of-way and easements of all public utilities of any and every description now located on and under or over the confines of this property and also subject to the rights of entry thereon for the purposes of maintaining, altering, repairing, removing or rerouting said utilities, including the City's water and sewer facilities. Said closure is also subject to any existing rights-of-way or easements of private third parties.

SECTION 3. *Conditions.* This partial street closure is conditioned upon payment to the City of the fair market value of the closed portion of the street, or its equivalent, and title to this closed portion of the street shall remain with the City until sale for fair market value, or the receipt of equivalent value, in accordance with Salt Lake City Code Chapter 2.58.

This partial street closure is also conditioned upon compliance with all of the conditions identified by the Salt Lake City Planning Commission, a modified summary of which is attached hereto as Exhibit "B".

SECTION 4. *Effective Date.* This ordinance shall become effective on the date of its first publication and shall be recorded with the Salt Lake County Recorder. The City Recorder is instructed not to publish or record this ordinance until the conditions identified above have been met, as certified by the Salt Lake City Property Manager and the Salt Lake City Planning Director. If the conditions identified above have not been met within one year from the date of this ordinance, the City Recorder is instructed not to publish or

record this ordinance, which shall become null, void and have no effect.

Passed by the City Council of Salt Lake City, Utah, this 13 day of April, 1999.

/s/ [Illegible]
CHAIRPERSON

ATTEST AND COUNTERSIGN:
/s/ Christine Meeker
CHIEF DEPUTY CITY RECORDER

Transmitted to Mayor on 4-14-99.

Mayor's Action: XXX Approved ____ Vetoed.

/s/ [Illegible]
MAYOR

ATTEST AND COUNTERSIGN:
/s/ Christine Meeker
CHIEF DEPUTY CITY RECORDER

(SEAL)

Bill No. 28 of 1999.
Published: May 3, 1999.

EXHIBIT "A"

MAIN STREET PROPERTY DESCRIPTION

Beginning at the Southeast corner of Block 87, Plat A, Salt Lake City Survey, located in the Southwest quarter of section 31, Township 1 North, Range 1 East, Salt Lake Base Meridian, and running thence North 00°01'42" west 660 feet along the east line of said block 87 to the Northeast corner of said block 87. Thence North 81°22'22" East 134.07 feet to the South right of way line of North Temple Street, a point that is North 00°02'13" West 18 feet from the Northwest Corner of Block 88, Plat A, thence South 00°02'13" East 678 feet along the west line of block 88 to the Southwest corner of block 88: thence South 89°05'14" West 132.68 feet to the point of beginning.

EXHIBIT B

Modified summary of conditions imposed by the Salt Lake City Planning Commission:

1. The City shall retain a perpetual easement for a 24-hour public pedestrian and bicycle access from North Temple to South Temple within the existing street right-of-way. The easement shall have no perimeter gates or fences along the North Temple or South Temple rights of way, but Petitioner may erect decorative fencing and similar structures which are commonly used in similar plazas, with written approval of the Planning Director. The plaza shall be planned and improved so as to maintain, encourage, and invite public use.

2. The Petitioner shall submit a construction schedule showing the traffic impacts of its construction work related to other construction projects in the area which are already underway or planned, and what mitigation measures are planned.

3. Construction work on the underground parking structure and plaza shall be performed in such a way that it does not interfere with the travel lanes on North Temple and South Temple streets during the reconstruction of South Temple Street.

4. A utility easement shall be retained by Salt Lake City through the former Main Street right-of-way for all existing public and private utilities.

5. To protect the view corridor to the Pioneer Museum and through to Ensign Peak no occupied buildings shall be constructed on the former Main Street right-of-way, except that Petitioner may erect and maintain one or more kiosks or information booths which may be occupied by attendants.

6. In the former Main Street right-of-way, all structures and buildings/uses (i.e. fountains, kiosks, trellises) ancillary to a pedestrian plaza that require a building permit shall be subject to approval by the Salt Lake City Planning Director.

7. The Planning Director shall have final approval of the landscaping plan and pedestrian plaza.

8. The zoning for the plaza shall be determined according to Section 21A.22.030 A of the Salt Lake City Code. Therefore the zoning will be UI and D-1 and the centerline of the former Main Street right-of-way shall be the boundary of the two districts.

9. An emergency vehicle access easement shall be established and constructed on the west side of the plaza through the former Main Street right-of-way.

10. Petitioner shall use its best efforts to discourage any through access from the parking garage onto Main Street northbound through the Capitol Hill neighborhood.

11. The pedestrian plaza and parking garage shall meet all applicable City Codes and requirements from all City Divisions and Departments.

12. Any construction activity associated with the new parking structure and/or plaza that will impact travel lanes on either North Temple or South Temple shall be completed before construction work is started on the South Temple reconstruction project between Main Street and 700 East.

13. The Petitioner shall participate on a special task force comprised of the City, the Utah Department of Transportation, and neighborhood representatives to

identify and recommend solutions to the longstanding traffic issues in these neighborhoods, including, but not limited to:

A. Excessive traffic volumes entering the Avenues neighborhood on Second Avenue;

B. Excessive commuter traffic using Victory Road, 600 North, Columbus Street, Main Street, and other Capitol Hill neighborhood streets; and

C. Jurisdictional roadway and/or operational transfer agreements between the City and UDOT affecting traffic control and operational issues such as traffic signal placement and timing, route signing, employment of traffic calming techniques, etc.

14. The Petitioner shall hold an open house to gain public input for the design of the pedestrian plaza before final approval.

STATE OF UTAH,)
) ss.
City and County of Salt Lake City,)

I, Beverly Jones Deputy, City Recorder of Salt Lake City, Utah, do hereby certify that the attached document is a full, true and correct copy of Ordinance 28 of 1999 closing a portion of Main Street between North Temple and South Temple pursuant to Petition No. 400-98-79 passed by City Council/Executive Action of Salt Lake City, Utah, April 13, 1999 as appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said City, this 27th day of April 1999.

/s/ Beverly Jones
Deputy City Recorder

Published May 3, 1999

[SEAL]

APPENDIX E

AFTER RECORDATION RETURN TO:
Kirton & McConkie
c/o Marc N. Mascaro
60 East South Temple, #1800
Salt Lake City, Utah 84111 [Recorded APR 27, 1999]

SPECIAL WARRANTY DEED

SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah ("GRANTOR"), hereby specially conveys and warrants against all acts of Grantor, including without limitation any conveyance, alienation, mortgage or other transfer or encumbrance, and not otherwise, pursuant to Petition No. 400-98-79 and Salt Lake City Ordinance No. 28 of 1999, to the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation, whose mailing address is 50 East North Temple, Suite 1800, Salt Lake City, Utah 84111, ("GRANTEE") for the sum of TEN DOLLARS ($10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, all of Grantor's interest in the following described real property located in Salt Lake County, State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO.

Said conveyance is subject to the following reservation of easements:

1. *Purpose of Easements.* The easements reserved herein are intended and shall be used for the following purposes only:

1.1. *Emergency and Public Safety.* Grantor hereby reserves an easement over and across the surface of the Property for access and passage by emergency and public

safety personnel and vehicles, including, without limitation, police, ambulance, paramedic and firefighting personnel and vehicles.

1.2. *Public and Private Utilities Easement.* Grantor hereby reserves an easement over, across and through the Property for operation, maintenance, repair, alteration, replacement, enlargement and emergency access, of all existing public and private underground utility lines, including, without limitation, water, sewer, storm drain, telecommunications, electrical, gas, fiber optic and cable lines. Grantor's utility lines may be relocated upon the mutual prior consent of both Grantor and Grantee (which consent shall not be unreasonably withheld), at the expense of the party requesting relocation. Other utility lines may be relocated upon the mutual prior consent of both Grantee and the owner of the utility line (which consent shall not be unreasonably withheld), at the expense of the party requesting relocation. Grantee shall not erect any buildings or other permanent structures, including other utility lines, over Grantor's utility lines which would impede Grantor's access to existing utility lines. Grantor shall not be responsible for the cost of restoring any surface improvements on the Property.

1.3. *Pedestrian Access and Passage.* Subject to the conditions, limitations, and restrictions set forth in section 2 hereinbelow, Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage only, including bicycles, provided that they are walked across the Property, and including dogs on leash. Skate boards, roller blades and roller skates shall not be allowed. The Property shall be available for such pedestrian access and passage at all times, both day and night. Grantee shall not erect any perimeter fences or gates on the Property along the North Temple or South Temple rights of way, but Grantee may erect decorative fencing and similar structures which are commonly used in plazas similar to

the Property, with the written approval of Grantor. Grantor may allow the general public to use this easement for pedestrian access and passage only, but all use of this easement shall be subject to the conditions, limitations and restrictions described hereinbelow.

1.4. *Preservation of View Corridor.* In order to preserve the view corridor to the Daughters of the Utah Pioneers Museum and to Ensign Peak, Grantee shall not erect any occupied buildings on the Property; provided, however, that Grantee may erect and maintain one or more kiosks or information booths which may be occupied by attendants.

2. *Conditions Limitations and Restrictions.* Notwithstanding anything to the contrary in this instrument, the easements reserved herein are subject to the following conditions, limitations and restrictions:

2.1. *Private Property.* The Property is and shall at all times remain the private property of Grantee. Nothing herein shall be deemed to dedicate the Property to public ownership or use beyond the scope of the reserved easement. The use of the Property by the Public is and shall remain permissive, and neither Grantor nor the public shall acquire any rights to the Property by such use beyond the scope of the easement reserved herein. Neither Grantor nor the public shall be entitled to claim or assert any prescriptive use rights or any right of adverse possession against Grantee. No third party shall be entitled to claim or assert any rights against Grantee or against the Property beyond the use of the easement described herein. Grantee shall have the right to landscape the Property, to improve the Property with gardens and/or other improvements, and to restrict the pedestrian access and passage to sidewalks or walkways intended for that purpose, provided that the pedestrian flow across the Property shall not be unreasonably obstructed or limited.

2.2. *Right to Prevent Uses Other Than Pedestrian Passage.* Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other users of the easement and are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

2.3. *Right to Exclude Habitual Violators.* Grantee may prohibit and lawfully prevent access to the Property by individuals who: (a) have threatened or intentionally caused harm to leaders or members of The Church of Jesus Christ of Latter-day Saints; or (b) have threatened or intentionally caused damage to buildings or property owned or used by Grantee or by The Church of Jesus Christ of Latter-day Saints; or (c) have on more than one previous occasion entered on the Property and engaged in activities identified in section 2.2 above.

3. *Enforcement.* Grantee may use all lawful means available to owners of private property to prevent any uses of

the easements which are contrary to the provisions of this instrument. Without limiting the generality of the foregoing, Grantee shall have the right to obtain injunctive relief enforcing the provisions of this instrument.

4. *Right of Reverter.* In the event that Grantee fails to use the Property for the purposes set forth herein, or fails to maintain the Property thereafter, the ownership of the Property shall, at Grantor's option, revert to Grantor.

5. *Notice and Opportunity to Remedy Deficiencies.* Prior to exercising the right of reverter, Grantor shall give written notice to Grantee of the deficiencies in Grantee's use or maintenance of the Property. Grantee shall thereafter have a period of no less than six months to remedy such deficiencies. If such deficiencies are remedied within that six month time period, title to the Property shall remain with Grantee. If such deficiencies are not remedied within that six month time period, Grantor shall give written notice to Grantee of such failure and title to the Property shall immediately revert to Grantor.

6. *Miscellaneous Provisions.*

6.1 *Integrated Agreement.* This instrument contains all of the terms, covenants, conditions and agreement between the parties hereto with respect to the subject matters treated herein.

6.2. *Severability.* In the event that it is finally determined by a court having jurisdiction over Grantee or the Property that any of the terms, conditions, limitations or restrictions set forth in this instrument are unconstitutional or otherwise unenforceable, the remaining terms, conditions, limitations and restrictions set forth herein shall remain binding and enforceable.

6.3. *Amendments.* Although Grantor may allow use of the pedestrian access easement reserved in section 1.2 by the general public, it is understood and agreed that this instrument and the easement reserved herein can be

amended, modified or terminated by written agreement between Grantee and Salt Lake City Corporation alone without the joinder or consent of any other person or entity. Any written amendment or modification of this instrument executed by Grantee and by Salt Lake City Corporation shall become binding immediately on all users of the easements reserved herein.

6.4. *No Agency Relationship.* Nothing in this instrument shall create or be construed as creating an agency relationship between Grantor and Grantee.

6.5. *Governing Law.* This instrument concerns real property located in the State of Utah and shall be governed by and construed in accordance with the laws of the State of Utah.

6.6 *Interpretation.* This instrument shall be interpreted and construed only by the contents hereof, and there shall be no presumption or standard of construction in favor of or against either Grantor or Grantee.

IN WITNESS WHEREOF, Grantor and Grantee have executed this instrument this ____ day of _____, 1999.

[RECORDED Apr. 27, 1999]

SALT LAKE CITY CORPORATION
GRANTOR

/s/ Deedee Corradini

ATTEST & COUNTERSIGN

/s/ Beverly Jones
Deputy City Recorder [SEAL]

STATE OF UTAH)
:ss.
County of Salt Lake)

On Apr 27 1999, personally appeared before me Deedee Corradini and Beverly Jones being by me duly sworn did say that they are the MAYOR and DEPUTY RECORDER, respectively, of Salt Lake City Corporation, a municipal corporation of the State of Utah, and that said persons duly acknowledged to me that said corporation executed the same.

/s/ Scott C. Crandall
NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:

[SEAL]

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS
GRANTEE

By: /s/ Richard C. Edgley
Title: Authorized Agent

STATE OF UTAH)
:ss.
County of Salt Lake)

On April 27, 1999, personally appeared before me Richard C. Edgley, personally known to me to be the authorized agent of the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, who acknowledged to me that he/she signed the foregoing instrument as AUTHORIZED AGENT for the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole, and that the seal impressed on the within instrument is the seal of said corporation, and the said authorized agent acknowledged to me that the said corporation executed the same.

[SEAL] /s/ Connie J. Roberts
NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:
Mar 1, 2000

EXHIBIT "A"

MAIN STREET PROPERTY DESCRIPTION

Beginning at the Southeast corner of Block 87, Plat A, Salt Lake City Survey, located in the Southwest quarter of section 31, Township 1 North, Range 1 East, Salt Lake Base Meridian, and running thence North 00°01'42" west 660 feet along the east line of said block 87 to the Northeast corner of said block 87. Thence North 81°22'22" East 134.07 feet to the South right of way line of North Temple Street, a point that is North 00°02'13" West 18 feet from the Northwest Corner of Block 88, Plat A, thence South 00°02'13" East 678 feet along the west line of block 88 to the Southwest corner of block 88: thence South 89°05'14" West 132.68 feet to the point of beginning.

Form No. 1344-A (1982) ORDER NO. 500353
ALTA Plain Language Commitment

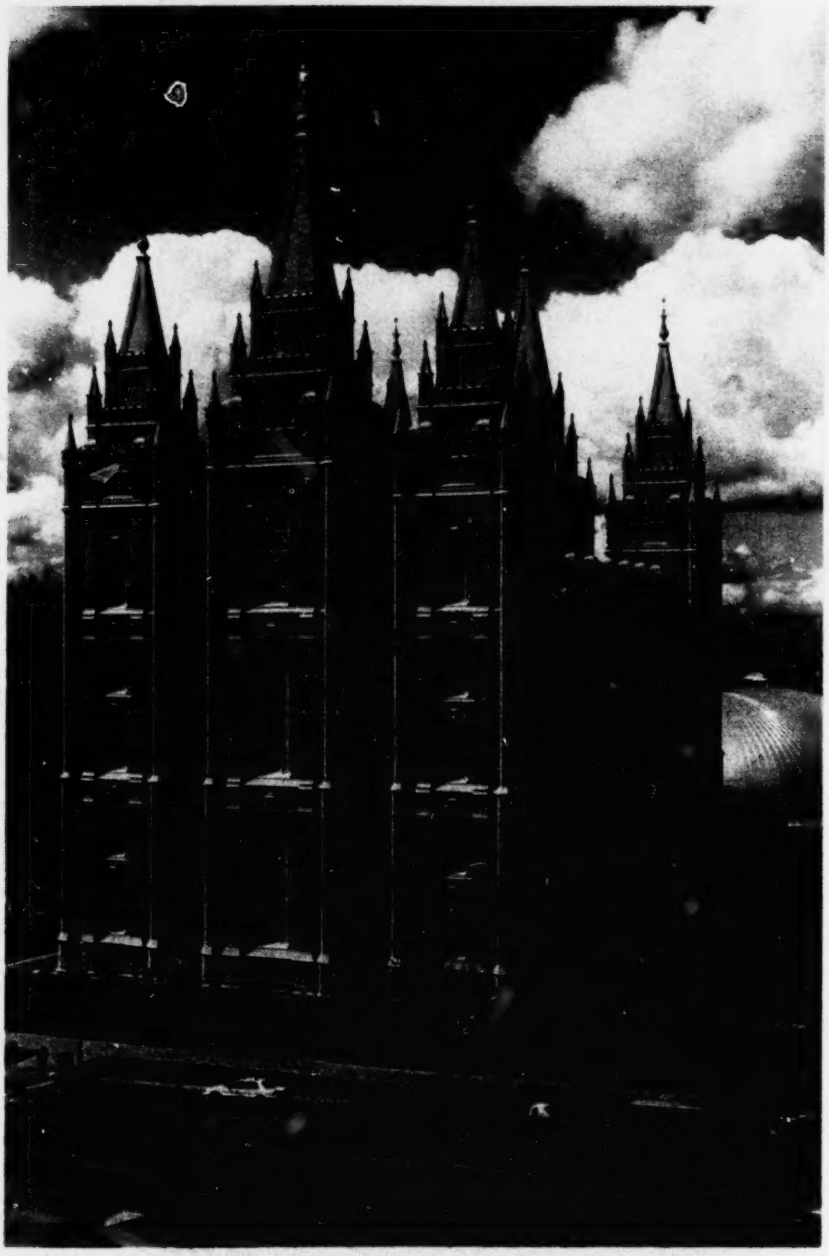
DESCRIPTION

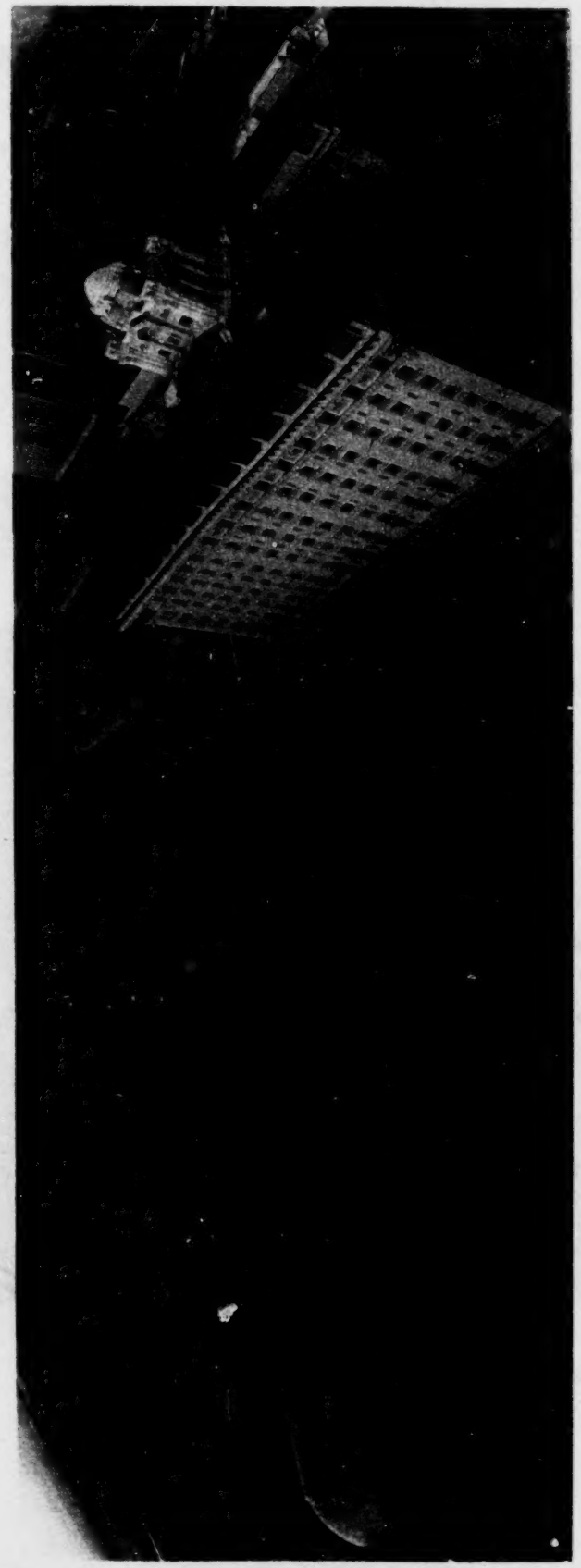
Beginning at the Southeast Corner of Block 87, Plat "A" Salt Lake City Survey, located in the Southwest Quarter of Section 31, Township 1 North, Range 1 East, Salt Lake Base and Meridian and running thence North 00°01'42" West 660.00 feet along the East line of said Block 87 to the Northeast Corner of said Block 87; thence North 81°22'22" East 134.07 feet to the South right-of-way of North Temple Street, a point that is North 00°02'13" West 18.00 feet from the Northwest Corner of Block 88, Plat "A", thence South 00°02'13" East 678.00 feet along the West line of Block 88 to the Southwest Corner of Block 88, thence South 89°05'14" West 132.68 feet to the point of beginning.

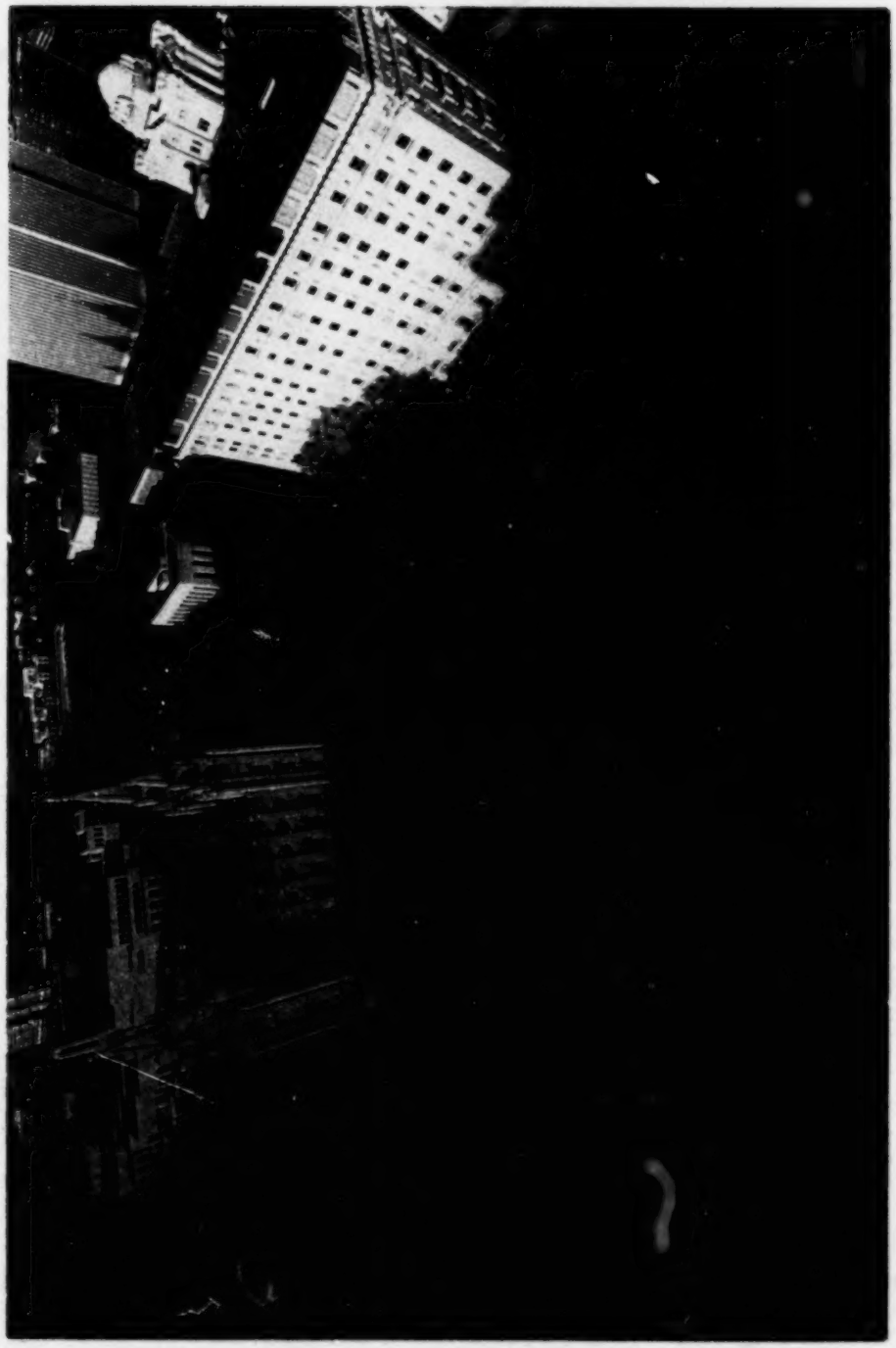
Less and excepting that portion conveyed in that certain Special Warranty Deed recorded November 9, 1993 as Entry No. 5651706 in Book 6797 at page 1426 of Official Records, being a parcel of land below the public right of way described as follows:

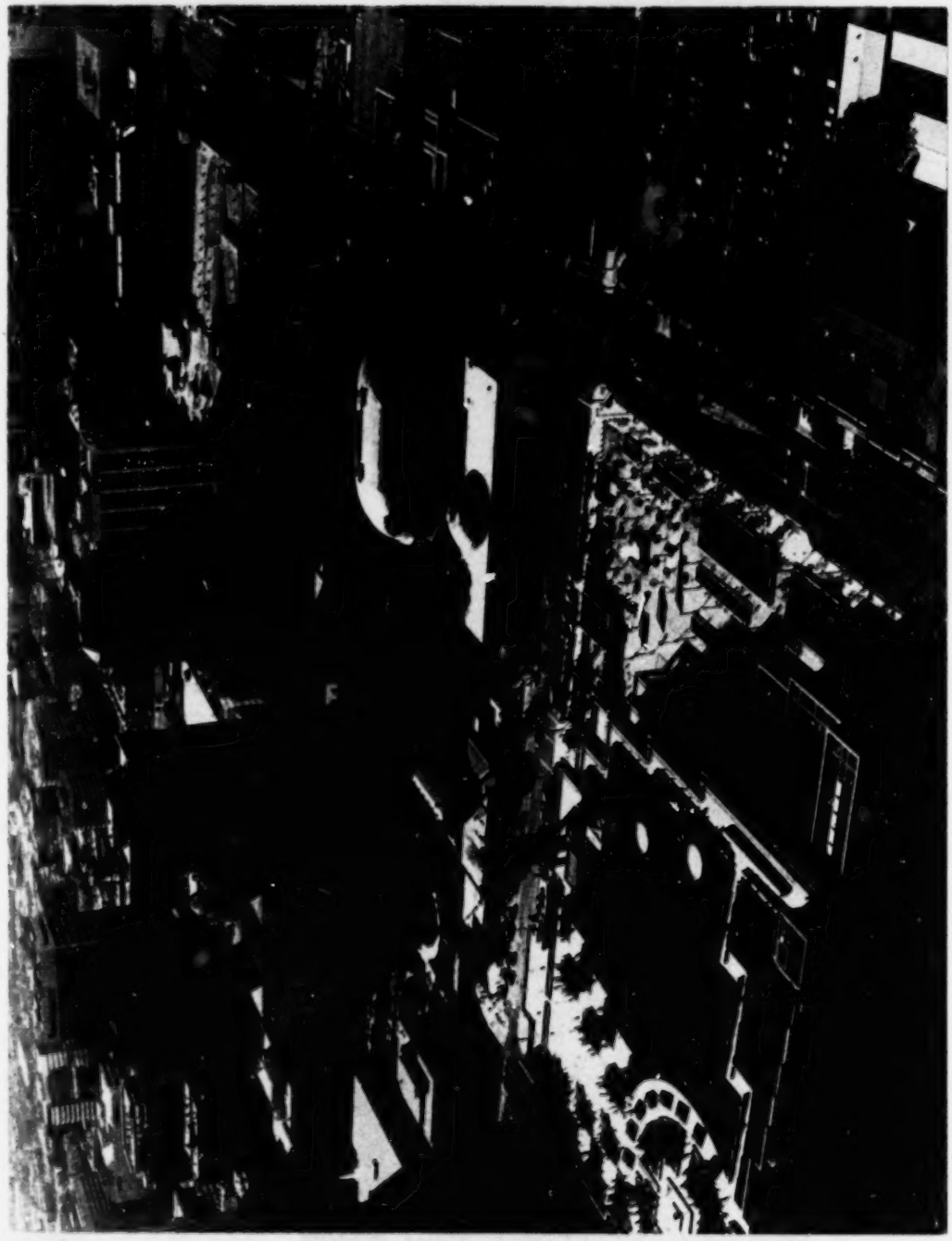
Beginning at the Southeast Corner of Block 87, Plat "A" Salt Lake City Survey, at elevation 4350.00 located in the Southwest Quarter of Section 31, Township 1 North, Range 1 East, Salt Lake Base and Meridian and running thence North 00°01'42" West 660.00 feet along the East line of said Block 87 to the Northeast Corner of said Block 87; at elevation 4358.65 thence North 81°22'22" East 134.07 feet to the South right-of-way of North Temple Street, a point that is North 00°02'13" West 18.00 feet from the Northwest Corner of Block 88, Plat "A", at elevation 4350.00 thence South 00°02'13" East 678.00 feet along the West line of Block 88 to the Southwest Corner of Block 88, at elevation 4350.00; thence South 89°05'14" West 132.68 feet to the point of beginning.

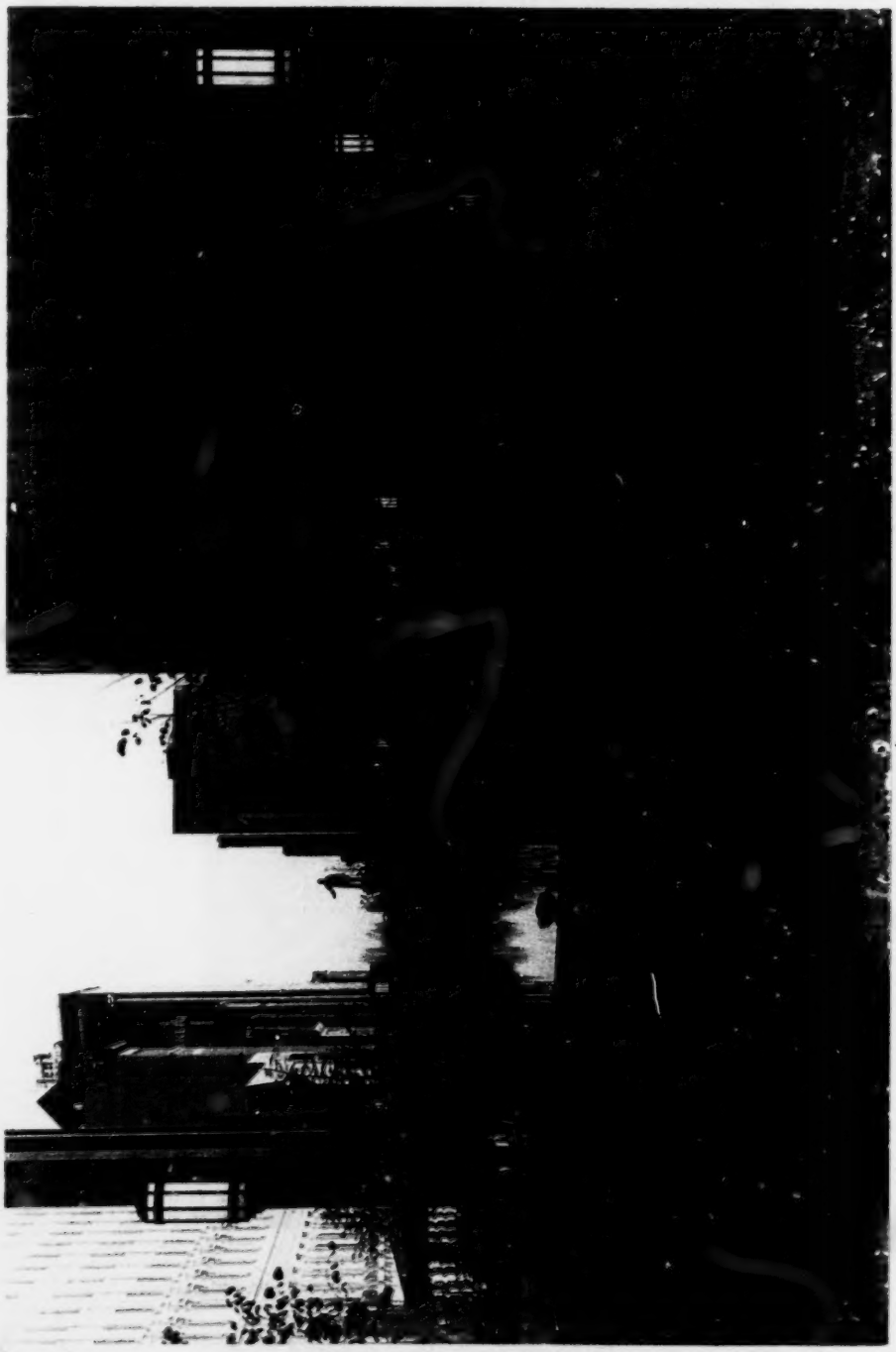
APPENDIX F

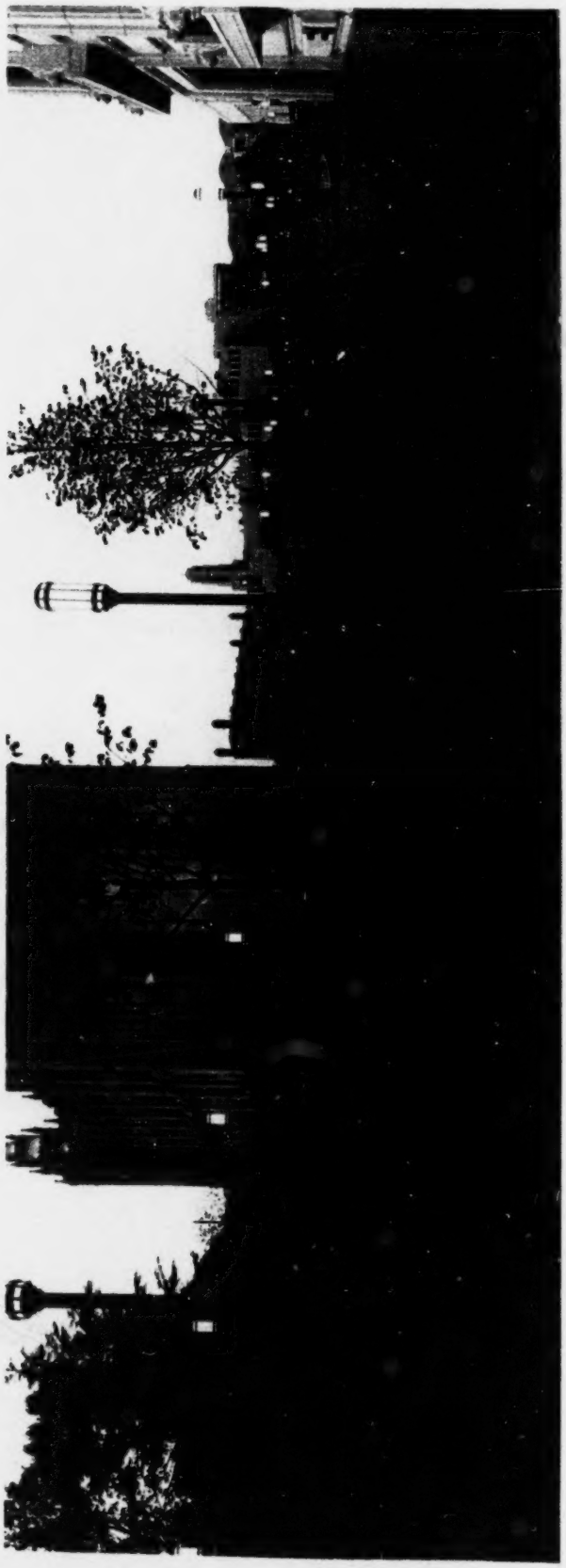




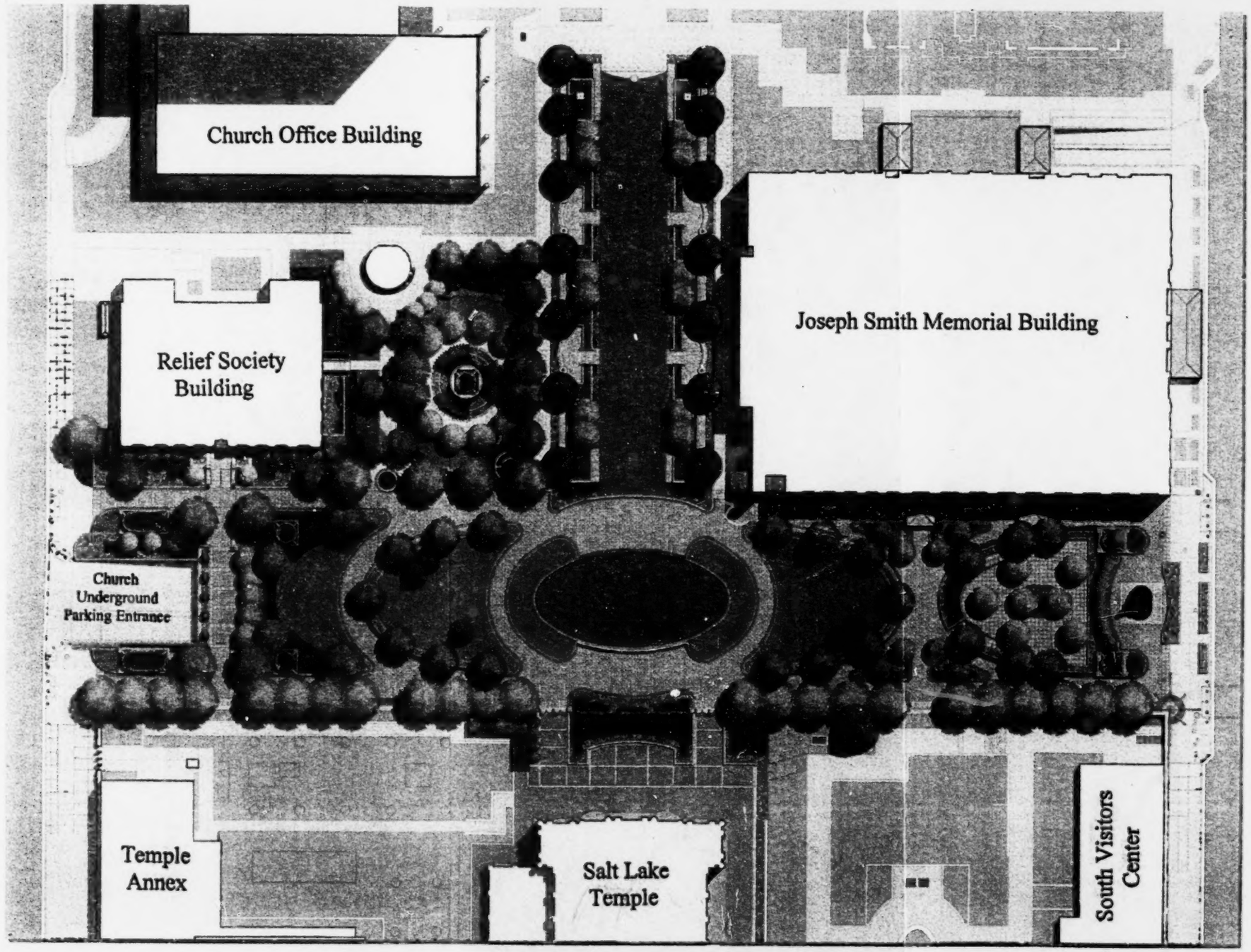








APPENDIX G



LDS Church Plaza

North

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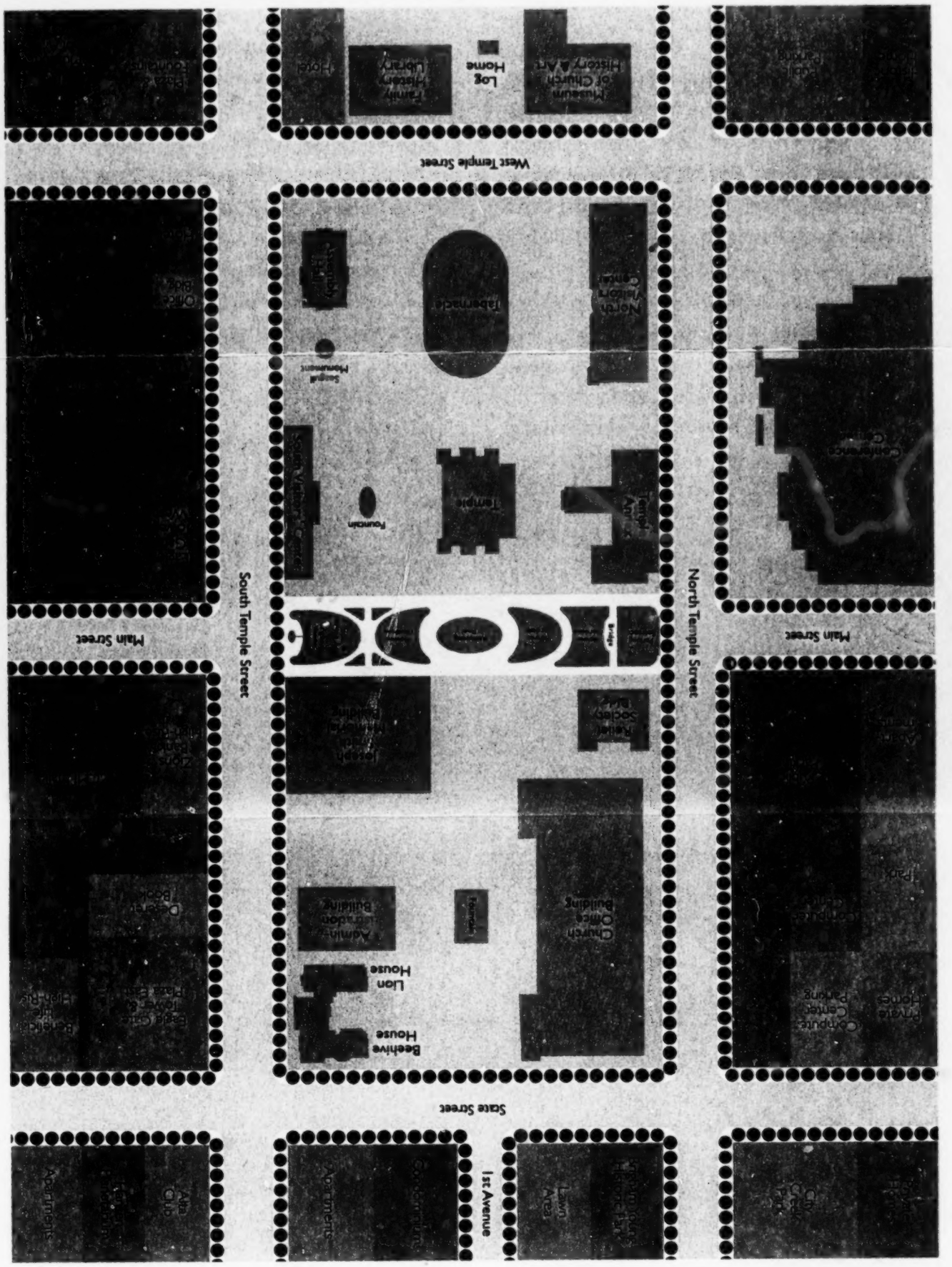

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Supreme Court, U.S.
FILED
MAR 01 2007

No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT SALT LAKE CITY CORPORATION IN SUPPORT OF PETITIONER

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Pursuant to S. Ct. Rule 12.6, the City respectfully submits this response in support of the LDS Church's petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit.

The City, as defendant below, sold the parcel of real property that is the subject of this litigation, to the LDS Church, and reserved unto itself an easement for the singular purpose of "pedestrian access and passage only." Pet. App. 87a. The deed of conveyance further provided that the "Property is and shall at all times remain the private property of [the LDS Church]" and that the easement was not intended "to create or constitute a public forum, limited or otherwise." *Id.* at 88a and 89a.

Consistent with the clear intent of the parties, the district court ruled favorably upon the City's and Petitioner's arguments and entered judgment accordingly. *Id.* at 74a. Upon review, the Circuit Court found that the easement was a "constitutionally cognizable property interest" that is "subject to forum analysis." *Id.* at 11a and 12a. At the conclusion of its forum analysis, the Circuit Court held that the LDS Church's property was burdened by the City's easement. *Id.* at 12a. Based thereon, the Circuit Court found that the easement had many of the characteristics of a public sidewalk and, accordingly, the easement created a public forum upon the LDS Church's private property. *Id.* at 28a. Additionally, the Circuit Court held that certain Deed restrictions could not be sustained in light of the Plaintiffs' First Amendment claims. *Id.* at 30a-31a. The Circuit Court reversed and remanded for the entry of judgment in favor of Plaintiffs below. *Id.* at 32a.

The questions presented by the LDS Church raise substantive issues that affect local governments throughout the United States. The conflicts between the various courts have a profound chilling effect upon the reasonable ability of local government to manage and dispose of public property. The private sector, given the Tenth Circuit Court's decision, will be understandably reluctant to purchase from or partner with local government for the development of public resources. Local government must have the ability to dispose of property that no longer meets the needs of the public so that it will have the resources to develop that infrastructure that meets those needs. The Tenth Circuit Court's decision does not permit the flexibility that is implicit in the decisions of the Second Circuit Court and the Nevada Supreme Court.

Furthermore, the Tenth Circuit's decision creates an untenable likelihood of compelling the LDS Church and the City to interact in a manner that raises the spectre of an Establishment Clause violation – the very issue that these parties attempted to avoid.[1]

Consideration by this Court is necessary to the final resolution and clarification of these significant, but conflicted, issues. In order for local government, specifically the City, to understand the proper tension between its role as a governmental landowner and the First Amendment, the City respectfully requests that this Court grant the pending Petition and enunciate a clear and functional statement in response to the questions presented.

---

1. The District Court found in the City's and the LDS Church's favor on the Establishment issue under the original arrangement. The Circuit Court declined to address the issue and the other Respondents did not cross-petition on that issue.

CONCLUSION

The City respectfully requests that the Court issue a Writ of Certiorari to review the decision and judgment of the United States Circuit Court for the Tenth Circuit.

Respectfully submitted,

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02-1350

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

—v.—

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, and UTAH NATIONAL ORGANIZATION FOR WOMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

REASONS FOR DENYING WRIT.....4

I. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER CIRCUITS..... .7

II. THIS CASE DOES NOT CREATE A CONFLICT WITH A HIGHEST STATE COURT THAT MERITS PLENARY REVIEW.....13

III. DESPITE THE PENDANCY OF *VIRGINIA v. HICKS,* THIS COURT SHOULD NOT GRANT *CERTIORARI* IN ORDER TO DETERMINE WHEN A PUBLIC FORUM CAN BE CLOSED.....16

IV. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS OR INTERFERE WITH MUNICIPAL GOVERNMENT AS ASSERTED BY PETITIONER.....19

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

Page

Arkansas Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998).....11

Chicago Acorn v. Metro. Pier & Exposition Auth.,
150 F.3d 695 (7th Cir. 1998).....9

Coughlin v. Tailhook,
112 F.3d 1052 (9th Cir. 1997).....15

Craigo v. Circus-Circus Ents. Inc.,
786 P.2d 22 (Nev. 1990).....15

Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission,
518 U.S. 727 (1996).....8, 9

Evans v. Newton,
382 U.S. 296 (1966).....20

First Unitarian Church of Salt Lake City v. Salt Lake City Corporation,
308 F.3d 1114 (10th Cir. 2002)..... *passim*

Frisby v. Schultz,
487 U.S. 474 (1988).....9

Hague v. CIO,
307 U.S. 496 (1939).....17, 20

Page

Hawkins v. City and County of Denver,
170 F.3d 1281 (10th Cir. 1999).....8, 9, 10

Henderson v. Lujan,
964 F.2d 1179 (D.C. Cir. 1992).....10

Hotel Employees & Rest. Employees Union Local 100 v. City of New York Dep't of Parks & Recreation,
311 F.3d 534 (2d Cir. 2002).....5, 7, 10

Int'l Society for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992).....17

Larkin v. Grendel's Den Inc.,
459 U.S. 116 (1982).....21

Lebron v. National Railroad Passenger Corp.,
513 U.S. 374 (1995).....20

Lederman v. United States,
291 F.3d. 36 (D.C. Cir. 2002).....10

Marsh v. Alabama,
326 U.S. 501 (1946).....20

Paulsen v. County of Nassau,
925 F.2d 65 (2d Cir. 1991).....10

S.O.C. Inc. v. Mirage Casino Hotel,
23 P.3d 243 (Nev. 2001).....13, 14

United States v. Grace,
461 U.S. 173 (1983).....17

Page

Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.,
257 F.3d 937 (9th Cir. 2001).....10, 13, 14

Virginia v. Hicks,
123 S.Ct. 990 (2003).....5, 6, 16

Warren v. Fairfax County,
196 F.3d 186 (4th Cir. 1999).....9

Other Authorities

10 A E. Mc Quillin, Law of Municiple Corporations
§ 30.32 (3d ed. 1990) 9

39 AMJUR.2D *Highways, Streets, & Bridges*
182-83 (1999).....9

STATEMENT OF THE CASE

This case arises out of the sale of one block of Main Street in downtown Salt Lake City to the Church of Jesus Christ of Latter-day Saints ("LDS," the petitioner). The sale was conditioned on the Petitioner's agreement to build a park-like pedestrian plaza (the "Plaza") on the property. To ensure that the Plaza would anchor the north end of Main Street and funnel pedestrian traffic between the residential neighborhoods located immediately to the north and the central downtown commercial district located immediately to the south, the City prohibited petitioner from erecting any perimeter wall or fences and reserved an easement providing for public access to and passage across the Plaza twenty four hours a day, seven days a week. Sidewalks have been constructed for this purpose. The sale of a premier downtown street essential to the flow of traffic marks this case as virtually unique. It is even more unusual because the easement securing the public's right of way is written in such a way that First Amendment activity is prohibited on the sidewalks – except for activities undertaken or approved by the petitioner. In fact, the City delegated to LDS officials the broad power to regulate even clothing or political buttons worn by pedestrians that contain any message petitioner, in its unfettered discretion and according to its own sectarian standards, might deem "offensive." Respondents filed this case to prevent enforcement of the restrictions on First Amendment activity and to ensure that responsibility for regulating activities on the easement rested with City, *not* LDS, officials.

The relevant facts in this case are not in dispute. The circumstances involving the history, sale, construction, location, use, and function of the plaza are accurately described in the opinion below. *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation*, 308 F.3d 1114,

1117-1120 (2002). The procedural history in this case is also accurately described therein. The following additional findings made by the court below are set out here because they provide the factual underpinnings for the court's conclusion that the "new" sidewalks that now pass over LDS property are by design and Deed legally indistinguishable from the old sidewalks for purposes of public forum analysis and the First Amendment:

- The City previously permitted public expression in this area when it was a public sidewalk abutting Main Street. *Id.* at 1129-30;
- The actual purpose and use of the easement is a pedestrian throughway for the general public. It provides pedestrian passage and forms part of the downtown pedestrian transportation grid. In this respect, it is identical to the sidewalks along that portion of Main Street previously served. *Id.* at 1026, 1030;
- The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic to the residential area to the north of the Plaza and the business areas to the south. *Id.* at 1026;
- The easement was particularly important to the City as a means of preserving and encouraging pedestrian traffic. It was specifically retained in order to preserve and enhance the pedestrian traffic grid in downtown. *Id.*;
- The easement was central to the role the City envisioned it playing in the character and development of Salt Lake City. *Id;*

- The City's actions approving the sale and resulting property ownership structure were specifically designed to ensure these aims were accomplished, and the pedestrian easement was central to these goals. The sale was expressly contingent on the retention of a perpetual easement requiring that the property be "planned and improved" so as to "maintain, encourage, and invite public use." In addition, the reservation contains a right of reverter in favor of the City enforceable if the property is not used for the purposes set forth in the Deed and easement. Finally, the City would not have agreed to the sale but for the easement. *Id.;*

- To the extent individuals with Church business enter onto the Plaza, this is not the only use or function of the property, or the purposes for which it was designed and intended to function. It is intended, rather, for pedestrian passage and is distinguishable from the types of walkways that merely provide ingress and egress to government facilities. *Id.* at 1127;

- To the extent the walkways provide access to Church facilities as an end destination for tourists, the former sidewalks along Main Street similarly provided tourists with the means of assessing portions of Church facilities. *Id.* at 1030;

These findings unquestionably support the lower court's conclusion that the public's right of way over the sidewalks secured by the easement has all the objective attributes of a traditional public forum. These facts also support the court's conclusion that the sidewalks have not been stripped of that status because of the changes in legal title or appearance, or because of limiting language in the

easement that purports to make those sidewalks something other than they actually are.[1]

REASONS FOR DENYING THE WRIT

This case involves a still-evolving dispute about the scope and legal effect of a recorded easement contained in a real property contract requiring unobstructed pedestrian use on the sidewalks that run parallel to a section of Main Street and that are constructed over the property of the adjacent landowner. Without citing any authority from this Court or the courts of appeal, petitioner maintains that the property is exempt from First Amendment constraints. Petitioner is assuredly wrong. Public highways and streets are often easements held for the public, with title to these property interests remaining in the abutting property owners. Holding that an easement cannot be a First Amendment forum would lead to the absurd conclusion that many public streets and

---

[1] Both petitioner and the City neglected to inform the Court that the issues surrounding the validity and enforcement of the easement in this case continue to develop. First, there is an unresolved dispute between the Church and the City about the effect of the Tenth Circuit's decision on the continued validity of the Easement. The two parties disagree whether the easement survives the decision under the terms of a severability clause in the Deed. Ignoring the plain language of the clause, which provides that if any "restrictions" are held unconstitutional the remaining provisions of the Deed stand, the Church argues that the easement itself must be severed. The City (correctly in our view) maintains that only the First Amendment restrictions need be severed, leaving the easement in place. *See* 308 F. 3d at 1026 n.8. Second, and of perhaps greater significance, there are events underway that will likely have a substantial impact on this case and could well moot it. The Mayor's office has filed a petition with the City planning authority to abandon the easement. The petition appears to have substantial political and public support and is working its way through the political and regulatory process. The plan being proposed is reported on the City's website (http://www.ci.slc.ut.us/mayor/plaza). These developments further militate against this Court's weighing in on issues that are not even settled and may disappear.

sidewalks are not traditional public fora, a holding that is contrary to decades of this Court's jurisprudence.

Despite the absence of authority supporting its position, petitioner advances three reasons for granting *certiorari* in this case. First, petitioner claims there is a conflict with a decision of the Second Circuit over the proper application of public forum analysis in a case that does not involve a traditional public forum or a sidewalk easement. Petitioner also claims there is a narrower conflict with the Nevada Supreme Court over the legal effect of an easement. Second, petitioner asserts that the Court should grant *certiorari* to undertake the impossible task of addressing the myriad factual circumstances under which the government may validly close a public forum. At a minimum, petitioner submits that the Court should defer consideration of that question pending the outcome of *Virginia v. Hicks*, 123 S.Ct. 990 (2003) (granting petition for *certiorari*). Finally, petitioner asks that *certiorari* be granted because of the "significant constitutional and practical problems" allegedly created by the Tenth Circuit decision. We respectfully submit that none of petitioner's claimed reasons for review have merit, and that the petition should be denied for the reasons set forth below.

1. Contrary to petitioner's contention, there is no conflict among the circuits on the standard for determining whether a public forum exists. Specifically, there is no merit to petitioner's claim that the decision below conflicts with the Second Circuit's recent decision involving New York's Lincoln Center for the Performing Arts. *Hotel Employees & Rest. Employees Union Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002). The cases were decided on completely different facts and do not raise a dispute over the applicable legal principles, but instead, they demonstrate nothing more than different outcomes arising from the application of established legal principles. The Second Circuit opinion not only

distinguishes this case on its facts, but also relies on an earlier Tenth Circuit decision involving the Denver Center for the Performing Arts – a case the Tenth Circuit convincingly distinguished from this one, demonstrating that no conflict exists. Petitioner also points to an alleged conflict with the Nevada Supreme Court on the question of whether a sidewalk easement over private property can be deemed a public forum for First Amendment purposes. But that alleged conflict is equally illusory. The issue identified by petitioner was not definitively resolved by the Nevada Supreme Court. Nor are we aware of any other federal or state authority that supports the asserted conflict on this narrower issue.

2. There is no overarching reason for this Court to grant *certiorari* in an effort to address the multitude of different circumstances under which the government might properly close a public forum. Petitioner does not even claim there is a conflict in the circuits on that question, and none exists, because those circumstances are necessarily fact-specific. While interesting First Amendment issues might arise in a case where the government transferred title to property without the reservation of an easement, this case does not remotely present those facts or those issues. To the contrary, the government here reserved an easement expressly for the purpose of maintaining the property as a pedestrian thoroughfare, and the sidewalks on which the easement is reserved and maintained are private in name only. Finally, there is no reason to hold this petition pending the outcome in *Virginia v. Hicks,* 123 S. Ct. 990 (2003) (02-371), as petitioner alternatively suggests. The result in this case is unlikely to change no matter how that case is decided.

3. No weight should be given to the petitioner's contention that the Tenth Circuit decision creates "significant constitutional and practical problems." Petitioner voluntarily agreed to keep the property open and accessible for pedestrian use and the City reserved an easement

establishing a public right of way over the property. Traditional public fora, such as streets and sidewalks, are often easements held for the public. The fact that title to the underlying land rests with the adjacent property owner has never been a consideration in this Court's public forum cases. In fact, this Court's cases have long held that private property does not confer absolute dominion. Petitioner's reliance on the Establishment Clause as another example of the type of practical and constitutional problems that flow from the opinion below is equally unavailing. It turns the Establishment Clause on its head to assert, that the City cannot regulate the easement without violating the Establishment Clause, but that the Church can. The Establishment Clause is not violated merely because the City regulates the sidewalks and streets adjacent to LDS Church property any more than it is violated when the District of Columbia government regulates the sidewalks adjacent to the National Cathedral. If anything, the Establishment Clause is violated under an arrangement that vests the Church with the authority to decide who can and cannot use a public easement, based solely on its own sectarian standards, and to exercise editorial control over public speech that takes place on the pedestrian right-of-way guaranteed by the easement.

I. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER CIRCUITS

Petitioner attempts to manufacture a conflict between the Tenth Circuit and the Second Circuit. That attempt fails because the two courts of appeal are in total agreement concerning the proper application of the public forum doctrine.

Applying this Court's well-established public forum law, the Second Circuit held in *Hotel Employees* that the plaza in front of Lincoln Center is not a public forum because it was not designed to serve as a public thoroughfare. 311 F3d at 550-52. Applying the same legal

principles, the Tenth Circuit similarly held that the plaza in front of the Denver Performing Arts Center is not a public forum because it was primarily designed to provide ingress and egress to the concert venues. *Hawkins v. City and County of Denver*, 170 F.3d. 1281, 1287-88 (10th Cir. 1999). It is hardly surprising, therefore, that the Second Circuit cited *Hawkins* with approval when it decided *Hotel Employees*. But it is equally unsurprising, and more legally relevant, that the Tenth Circuit easily distinguished *Hawkins* when it decided this case. What petitioner describes as a conflict is simply a reflection of the fact that the same principle applied to different factual circumstances will often lead to different results. Petitioner must show more than that to justify a grant of *certiorari*.

Unlike Lincoln Center, the property in dispute here involves a section of Main Street in downtown Salt Lake City that was sold to the Church and converted into a pedestrian plaza with the full understanding and agreement of the parties that the Plaza would continue to function as a conduit for pedestrian traffic incorporated into the City's transportation grid. The City reserved an easement over the property for this very purpose; indeed, that was a "central" element of the transaction from the City's perspective. By contrast, the Second Circuit concluded in *Hotel Employees* that the plaza outside Lincoln Center performs a different function. Whether one agrees or disagrees with that conclusion, it formed the basis for the Second Circuit's holding. Nothing in the Second Circuit's decision suggests any disagreement with the Tenth Circuit's holding that sidewalks that continue to function as a public thoroughfare by virtue of an easement should continue to be treated as a public forum for First Amendment purposes.[2] Indeed, as

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[2] *Cf. Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission* 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that in the majority of jurisdictions, title to

this Court has observed, streets and sidewalks are the "archetype of a traditional public forum." *Frisby v. Schultz,* 487 U.S. 474, 480 (1988). Petitioner's quarrel is with the Tenth Circuit's premises, but that is entirely a factual dispute. Once the premise is accepted, the Tenth Circuit's public forum analysis is both unexceptional and entirely consistent with the Second Circuit's approach and with this Court's longstanding precedents.

If anything, the Lincoln Center case and a dozen other cases, as well, demonstrate that the lower courts fully understand the governing legal principles and are entirely capable of applying this Court's public forum doctrine to disparate facts. *See Hawkins*, 170 F.3d at 1287-88; *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998) (sidewalks, plaza, and amusement park located on Navy Pier are not a public forum); *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (park-like mall on grounds of government complex is a traditional public forum); *Paulsen v. County of Nassau,* 925 F.2d 65 (2d Cir.

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some of the most traditional of public fora, streets, and sidewalks remain in private hands). *See also* 10 A E. Mc Quillin, Law of Municipal Corporations § 30.32 (3d ed. 1990). *See also* 518 U.S. at 827-28 (Thomas, J., concurring in the judgment in part and dissenting in part) (describing the common practice of formally dedicating land for streets and parks when subsidizing real estate for developments; "Such dedications may or may not transfer title, but they at least create public enforceable easements in the dedicated land. To the extent that those easements create a property interest in the underlying land, it is that government owned property interest that may be designated as a public forum.") (citiations omitted).

The Court of Appeals decision here proceded from this basic understanding of how title to streets and sidewalks is generally held in many jurisdictions. "[H]olding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners." 308 F. 3d at 1023 citing 39 AMJUR.2D *Highways, Streets, & Bridges* 182-83 (1999) (citations omitted).

1991) (sidewalks around sports complex are a designated public forum); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937 (9th Cir. 2001) (sidewalks in Las Vegas gaming district are a public forum); *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992) (sidewalks surrounding Vietnam Veteran's Memorial are a public forum); *Lederman v. United States,* 291 F.3d. 36 (D.C. Cir. 2002) (sidewalks outside Capitol building are a public forum). Hence, not only is there no conflict among circuits, there is no confusion in the lower courts over the governing legal standards or a need for further clarification by this Court.

In an effort to create a conflict, petitioner emphasizes its own version of the facts, but its recitation is both incomplete and misleading. There can be no doubt that the Lincoln Center case turned on a number of limiting factors conspicuously absent from any mention in the petitioner's brief, including most importantly the fact that the plaza forecourt "does not form part of the City's transportation grid in the way that traditional streets and sidewalks do." 311 F.3d at 550. The Second Circuit also observed that the ability of pedestrians to cross the plaza as a "shortcut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex." *Id.* As the Second Circuit itself pointed out, these facts were critical to its decision and, in its view, clearly distinguished Lincoln Center from this case. *Id.* at 551-52. *See also Hawkins,* 170 F.3d at 1287-88 ("[T]he galleria does not form part of Denver's automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles and pedestrians generally do not use it as a throughway to another destination. Rather, the galleria's function is simply to permit ingress to and egress from the DPAC's various complexes").

The factors cited by petitioner as creating a conflict cut against its argument. In discussing the Plaza's location,

function and purpose, the Second Circuit drew a comparison to the sidewalks under consideration in this case. The comparison erases the petitioner's alleged conflict:

> Thus, it is apparent that the Plaza's primary function and purpose is to serve as a pleasing forecourt at the center of a prominent performing arts complex, to facilitate patrons' passage into the events taking place in the arts buildings, and symbolically to promote the cultural arts to the benefit of the community. Although the Plaza's design clearly invites passers-by to stroll through or linger, the Plaza was not created primarily to operate as a public artery, nor to provide an open forum for all forms of public expression. *Cf. First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1125-27 (10th Cir. 2002) (holding that a portion of Main Street sold to church and converted into pedestrian plaza is a traditional public forum because by retaining easement for public passage, City intended to "encourage pedestrian traffic" and to "preserve and enhance the [downtown] pedestrian grid.")

Id. at 551-52. Petitioner provides no answer for the critical differences in the facts of the two cases.[3]

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[3] Petitioner also attempts to create a conflict by asserting that, unlike the Second Circuit, the court below did not give any weight to the City's intent not to create a public forum in this case. The Second Circuit only weighed this factor, however, because Lincoln Center did not involve a traditional public forum. It specifically acknowledged the principle followed by the Tenth Circuit that a traditional public forum is "open for expressive activity regardless of the government's intent." *Id.* at 551 n. 12 (quoting *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). *See First Unitarian Church*, 308 F.3d. at 1125. Thus, there is no disagreement between the Courts of Appeals on this point.

The distinguishing factors present in this case cited by the Second Circuit panel are not casual or accidental invocations. They go to the very heart of the public forum analysis. The actual purpose and use of the easement in this case is a pedestrian throughfare. This is not merely the use the City has in practice permitted, but also the expressed purpose for which the City reserved the easement. "The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area north of the plaza and the business areas to the south." 308 F.3d. at 1126. While the City wanted to close the street to automobile traffic, "it simultaneously wanted to preserve and indeed encourage pedestrian traffic. The easement through the plaza was specifically retained in order to preserve and enhance the pedestrian grid in the downtown." *Id.* Unlike the forecourt at Lincoln Center, the easement was neither established nor functions solely for "ingress and egress to church facilities." *Id.* at 1127. Petitioner's attempt to draw a parallel to the description of how the forecourt at Lincoln Center functions is at odds with the findings in this case. The plaza here does more than provide access to those with Church business. The petitioner's suggestion to the contrary "does not capture the actual or articulated purpose of the easement, a pedestrian walkway for the public at large." *Id.* After reviewing the publicly and legislatively stated purposes of the easement, the court concluded that the easement exists "for pedestrian passage, it forms part of the downtown pedestrian transportation grid, and is open to the public." *Id.* at 1128.

In view of the obvious factual differences between how Lincoln Center and the Plaza in this case function, petitioner's argument that there is a conflict is incorrect. Petitioner's contention is further undermined by the fact that

the Second Circuit specifically discussed and distinguished this case, thus rejecting the claimed conflict on which petitioner now relies. Finally, the Lincoln Center case is fully consistent with the Tenth Circuit's earlier decision involving the Denver Performing Arts Center, thus further undermining the asserted conflict.

II. THIS CASE DOES NOT CREATE A CONFLICT WITH A HIGHEST STATE COURT THAT MERITS PLENARY REVIEW.

Petitioner's reliance on an alleged conflict between the Tenth Circuit and the Nevada Supreme Court is similarly misguided. On pages 15-16 of its brief petitioner argues that the Tenth Circuit's decision directly contradicts the Nevada Supreme Court's conclusions in *S.O.C. Inc. v. Mirage Casino Hotel*, 23 P.3d 243 (Nev. 2001). A review of that case demonstrates otherwise. The case was decided following a federal district court decision that held that the sidewalks running along Las Vegas Boulevard ("The Strip") were a public forum even though title to the property rested with the casino. As here, the sidewalks were encumbered by a public right of way. *Venetian Casino Resort v. Local Joint Executive Board,* 45 F. Supp.2d. 1027 (D. Nev. 1999), *aff'd,* 257 F3d 957 (9th Cir. 2001). *S.O.C.* was an *en banc* decision by six of the seven members of the Nevada Supreme Court. *Id.* at 244. Justice Leavitt voluntarily recused himself from the case. *Id.* at 251, n. 51.

While the Nevada Supreme Court voted 5 to 1 to uphold the preliminary injunction entered in favor of the casino, it was evenly split on the question of whether the sidewalk in question is a public forum. Writing for three members of the Court, Justice Young concluded that the sidewalk was not a public forum, despite the pedestrian easement. *Id.* at 247. The concurring opinion by Justices Maupin and Shearing agreed with the results but disagreed on the issue of the public forum status of the sidewalk.

> The basic question in this matter was convincingly settled in *Venetian Casino Resort v. Local Joint Executive board.* 45 F.Supp. 2d 1027 (D.Nev. 1999). In *Venetian*, the defendant unions obtained a permit to picket in a private pedestrian walkway fronting the Venetian Casino Resort. That sidewalk is directly across the street from, and in every relevant respect identical to, the properties at issue in the instant matter. The federal district court concluded that the Venetian property "was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public. As such, it falls within a very limited exception to the general rule that private property is not subject to the First Amendment." *Id.* at 1036. This exception must also apply here.

Id. at 252.

Justice Rose's dissenting opinion likewise treated the sidewalk as a public forum.

> The real property in question consists of two traditional sidewalks abutting Las Vegas Boulevard that are traversed daily by thousands who use the sidewalks as a principal thoroughfare along the City's most famous stretch of casinos, the Las Vegas Strip. By the very location and function of the sidewalks, I think it is impossible not to conclude that they serve as traditional public sidewalks. Similar thoroughfares, whether publicly or privately owned, have been recognized as public forums on which all First Amendment rights must be recognized and

> honored. Therefore, I disagree with the majority's conclusion that the area in question is not a public forum.

Id.

In light of the Nevada's Supreme Court's inability to come to any majority position concerning the status of the Mirage sidewalk, petitioner's argument that there is a concrete conflict between the Tenth Circuit and the Nevada Supreme Court is incorrect.[4] At most, this is a nominal conflict arising from an ambiguous decision decided in the context of an appeal from a preliminary injunction by a state supreme court located outside the Tenth Circuit. This is simply not the type of conflict—assuming any exists at all – that warrants this Court's intervention.[5]

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[4] Obviously aware of the limited reach of the Nevada decision, the petitioner argues that under Nevada law "the reasoning and holding of the plurality view is binding unless and until overruled by three or more justices of [the] court or an intervening act of the Legislature." *Craigo v. Circus-Circus Entrs. Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990) Pet. App. 15 n.5. That view was expressed in a plurality opinion itself and is of dubious precedential value. The concurring Justice in *Craigo* specifically rejected the position advanced by the petitioner here. *Id.* at 21 n.7 (Springer, J., concurring). We have found no other cases which have followed the unusual rule announced in *Craigo* and at least one case which repudiates it. *Coughlin v. Tailhook*, 112 F.3d 1052, 1056 (9th Cir. 1997) ("*Craigo* was not signed by a majority of the Nevada Supreme Court, leaving it with no precedential value.")

[5] Even if petitioner's asserted conflict exists based on the plurality opinion of the Nevada Supreme Court, this Court's cases recognize that formal title to streets and sidewalks often rests with the abutting landowner. Despite the conclusion reached by the Nevada Supreme Court, this factor has never been thought to affect the public forum determination. *See*, n.2, *supra*.

III. DESPITE THE PENDANCY OF *VIRGINIA v. HICKS*, THIS COURT SHOULD NOT GRANT *CERTIORARI* IN ORDER TO DETERMINE WHEN A PUBLIC FORUM CAN BE CLOSED

According to petitioner, this Court's pending case in *Virginia v. Hicks*, 123 S.Ct. 990 (2003), may decide the circumstances under which a public forum can be closed. Petitioner recognizes, as we do, that the public forum issue may not even be decided in *Hicks* since the public forum determination did not figure in the decision below. Petitioner nevertheless argues that a decision in this case should be postponed pending the outcome of *Hicks*. Petitioner speculates that a decision in *Hicks* will resolve the issue definitively in its favor. We respectfully disagree since the facts in the two cases are completely at odds.

Alternatively, petitioner asserts that if the public forum issue is not decided in *Hicks*, the Court should grant *certiorari* and resolve the issue of when the government can close a public forum. But this case does not present an appropriate record to resolve that issue. Here, there is not only a reserved easement but also a factual finding that the easement in practice continues to fulfill its intended and historic function as a public thoroughfare. Even petitioner has never claimed that this factual finding is clearly erroneous. The Court might someday want to consider a case in which there has been an unencumbered transfer of title from public to private ownership. However, that issue is not presented by these facts.

Given the record in this case, petitioner is unlikely to benefit from a decision on the public forum issue in *Hicks* – regardless of the outcome. A holding that the Housing Authority's streets in that case are still a public forum

because they continue to function as public streets would obviously not help petitioner. Likewise, a holding that the Housing Authority streets in *Hicks* are no longer a public forum because they no longer function as public streets would not help petitioner because of the contrary factual findings in this case.

Petitioner's view is that the government always retains authority to close a public forum by, among other things, selling the property. *See Int'l Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring). We have no quarrel with this general observation, but clearly it must be understood in the context of the overriding principle that "wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purpose of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). Streets and sidewalks are "those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 173, 179 (1983). The government cannot overcome that presumption by mere fiat; "it must alter the objective physical character or physical uses of the property, and bear the attendant costs." *Lee,* 505 U.S. at 700. Neither the fact that legal title to the streets has passed from the City to the petitioner nor the fact that the sidewalks no longer look like traditional curb and gutter sidewalks negates the public forum status of municipal sidewalks under circumstances where, as here, they continue to have the essential form and function of municipal sidewalks by design and by Deed.

There has been no fundamental alteration in the objective physical characteristics or uses of the property other than the fact that the sidewalks now pass over a pedestrian plaza that petitioner has built on what used to be

Main Street. Although the sidewalks do not resemble traditional curb and gutter sidewalks, they continue to serve as a pedestrian throughway for downtown commuters, shoppers, and visitors. The Plaza itself is not unlike pedestrian malls in other cities. It features flower beds, benches, a fountain, and statues of historical interest, including a large statue of Utah founder and Mormon leader Brigham Young. This statue has stood on an island in the middle of Main Street for decades. The Plaza anchors the north end of downtown and is a central thoroughfare between the commercial district to the south and the residential area immediately to the north. The State Capitol and other government buildings lie just a little further north. The sidewalks remain part of the downtown transportation grid and are freely accessible to the general public. To the extent the sidewalks provide access to petitioner's buildings or a view of religious imagery and statuary, the former public street and sidewalks did the same, just as many public streets and sidewalks across the country abut religious property. Similarly, to the extent the sidewalks provide access to the Church campus as an end destination for tourists, the former sidewalks along Main Street similarly did. 308 F.3d 1126-1130.

The Court should not grant *certiorari* in order to resolve what petitioner erroneously characterizes as the "struggle" in the lower courts over the issue of how a government may properly close a public forum. We do not understand the lower courts to have struggled with this issue and see no evidence of a conflict in the Courts of Appeals. The petitioner cites no such cases. Moreover, this case does not clearly present that issue since petitioner voluntarily agreed to keep its property open. Finally, we emphasize that absent any plausible basis to believe that the outcome in *Hicks* will lead to a different outcome in this case, the Court should reject petitioner's reliance on *Hicks* as grounds for granting *certiorari* in this case.

IV. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS OR INTERFERE WITH MUNICIPAL GOVERNMENT AS ASSERTED BY PETITIONER

Petitioner greatly exaggerates the legal significance of the issue in this case and attempts to draw the Court into an abstract dispute about the imperilment of property rights and the danger to the administration of government.[6] The property rights asserted by petitioner are not absolute. Its rights are subject to the government's property interest secured by the easement. Dedications of land for streets, sidewalks and parks are common practice in real estate development. *See n.2, supra.* The decision in this case poses no more a threat to petitioner's asserted property interests than this common practice. The decision simply ensures that municipalities do not surrender the public's First Amendment rights even for other public benefits such as urban renewal or, as here, revenue from the sale of public property. While every easement may not create a public forum, this case involves Main Street and nothing more. Easements involving access to public beaches, parks, and hiking trails may raise different considerations but this case involves none of those properties.

What petitioner is really asking the Court to do is to analyze this case divorced from the facts and from the easement it voluntarily allowed the City to retain as part of the transaction involving the sale of the property. Petitioner seeks to totally distance itself from any constitutional requirements that flow from the existence and the operation

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[6] At the same time, petitioner understates how unusual this case is. How often will it occur that Main Street, U.S.A. or Fifth Avenue in New York is deeded away to a private entity, much less to a church. The development of public forum law should not rest on such unique facts.

of the easement. But expressive activities have been historically compatible with, if not virtually inherent in, property dedicated to general pedestrian passage. The two uses cannot be disengaged. The court below correctly rejected this attempt by both the City and the petitioner to sidestep the constitutional obligations that flow from the operation of streets and sidewalks.

The petitioner and the City cannot have it both ways. Once having reserved the easement, the City cannot walk away from its constitutional obligations. Similarly, once having agreed to the easement, the petitioner has no say in the matter. Holding the City and the petitioner to constitutional requirements under the circumstances present in this case is hardly controversial. The decision below does not break new ground, nor does it present the grave danger to private property interests that petitioner asserts. If petitioner has a quarrel, it is a quarrel with the City about the easement, not a quarrel with the Tenth Circuit about the law. As the Tenth Circuit recognized, the law is clearly established that public streets are often easements held for the public. *See n.2, supra.* Contrary to petitioner's claim, the right to assemble and communicate in such places may not be abridged or denied regardless of the formalities of ownership. By taking title subject to the City's easement, petitioner's property is encumbered by the First Amendment constraints that flow from the easement.[7]

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[7] Formalities of title do not control the public forum analysis. *Hague v. CIO*, 307 U.S. at 515 ("wherever the title of streets and parks may rest, they have immemorially been held in trust for use by the public..."); *cf. Marsh v. Alabama,* 326 U.S. 501, 506 (1946) ("ownership does not always mean absolute dominion.") *See also Evans v. Newton,* 382 U.S. 296, 302 (1966) (mere fact of private ownership was not enough to divest the park of its "public character"; the Fourteenth Amendment applied "regardless of who now has title under state law"). Simply declaring an entity to be private "does not alter its characteristics so as to make it something more than it actually is." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 393 (1995).

Finally, petitioner's argument that the City's enforcement of the easement will run afoul of the Establishment Clause is totally without merit. Municipalities routinely enforce local laws governing conduct on the streets and sidewalks within their jurisdiction. Many of these laws directly target First Amendment activity. We are aware of no principle of law that would prevent the enforcement of those laws on the streets and sidewalks that run past the local church or synagogue just because title to the streets may or may not rest with the abutting landowner. Yet, that seems to be the position that petitioner has staked out by asserting that any government oversight over the sidewalks presents both *entanglement* and *endorsement* problems under the Establishment Clause. This concern is more fanciful than real particularly since petitioner has neither the authority nor the right to make decisions involving conduct and other First Amendment activity on the City property that runs over the Plaza. This responsibility is reserved to the City.

Petitioner's argument turns the Establishment Clause argument on its head. It is plaintiffs who have asserted an *entanglement claim* based on the terms of the easement allowing the petitioner to exert editorial control over what is said, who gets to speak, and under what circumstances speech is permitted. Allowing petitioner to make these decisions involving speech conducted on public property is a function that is reserved to the government. *See Larkin v. Grendel's Den Inc.*, 459 U.S. 116, 122-23 (1982). Although the Court of Appeals found it unnecessary to resolve this claim based on its disposition of the case on public forum grounds, it is no answer to this very serious claim that the Court is powerless to remedy it or the First Amendment claim because it creates a separate *entanglement* problem that is more fanciful than real.

CONCLUSION

For the reasons states above, the writ of *certiorari* should be denied.

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No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE LEGAL UNCERTAINTY CREATED BY THE DECISION OF THE TENTH CIRCUIT 3

A. The Tenth Circuit's Decision Has Created Substantial Uncertainty By Disregarding The Lines Drawn By This Court's Precedents 3

B. The Decisional Conflicts Resulting From The Tenth Circuit's Opinion Create Uncertainty In The Realm Of Property Transactions Where Predictability Is Essential 8

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TENTH CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE ABILITY OF LOCAL GOVERNMENTS TO MANAGE PROPERTY IN THE PUBLIC INTEREST 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.,
391 U.S. 308 (1968) 5

Arkansas Educational Television Commission v. Forbes,
523 U.S. 666 (1998) 6

Blum v. Yaretsky,
457 U.S. 991 (1982) 7

Brentwood Academy v. Tennessee Secondary School Athletic Association,
531 U.S. 288 (2001)) 7

Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,
473 U.S. 788 (1985) 6

County of Allegheny v. ACLU, Greater Pittsburgh Chapter,
492 U.S. 573 (1989) 12

Denver Area Educational Telecommunications Consortium, Inc. v. FCC,
518 U.S. 727 (1996) 6

Evans v. Newton,
382 U.S. 296 (1966) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Flagg Brothers, Inc. v. Brooks,
436 U.S. 149 (1978) 6

Frisby v. Schultz,
487 U.S. 474 (1988) 11

Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Department of Parks & Recreation,
311 F.3d 534 (2d Cir. 2003) 4, 8

Hudgens v. NLRB,
424 U.S. 507 (1976) 4, 5, 6, 8

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 5

Labrum v. Rickenbach,
711 P.2d 225 (Utah 1985) 3

Lee v. Weisman,
505 U.S. 577 (1992) 12

Lemon v. Kurtzman,
403 U.S. 602 (1971) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Leo Sheep Co. v. United States,
440 U.S. 668 (1979) 3

Lloyd Corp. v. Tanner,
407 U.S. 551 (1972) 5, 11

Marsh v. Alabama,
326 U.S. 501 (1946) 6

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 2

Perry Education Association v. Perry Local Educators' Association,
460 U.S. 37 (1983) 6

Rendell-Baker v. Kohn,
457 U.S. 830 (1982) 4

S.O.C., Inc. v. Mirage Casino-Hotel,
23 P.3d 243 (Nev. 2001) 8

United States Postal Service v. Council of Greenburgh Civic Associations,
453 U.S. 114 (1981) 6

Virginia v. Hicks,
123 S. Ct. 990 (2003) 3

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

Utah Code Ann. § 10-8-2(1)(c)-(d) 10

OTHER AUTHORITY

69 C.J.S. *Municipal Corporations* § 881 (1999) 10

Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 8:02[1] (rev. ed. 1995) 3

Molly McDonough, *Defining a Public Space: Courts Interpret the Meaning of "Traditional Public Forum,"* 89 A.B.A.J. 24 (2003) 4

Restatement (Third) of Property: Servitudes (2000) 3

William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. Ill. L. Rev. 521 (1986) 10

INTEREST OF THE *AMICI CURIAE*[1]

This brief is filed on behalf of the National League of Cities ("NLC"), the International Municipal Lawyers Association ("IMLA"), and the National Association of Counties ("NACo").

The NLC is a non-profit organization whose members include 49 state municipal leagues and approximately 1,800 member cities and towns. Through the member state municipal leagues, NLC also represents more than 18,000 municipalities.

The IMLA is a non-profit organization that has served as an advocate for local government attorneys since 1935. Its members include lawyers from more than 1,400 local governments. IMLA serves as the legal voice for the nation's local governments and thus has a vital interest in legal issues that affect municipalities.

The NACo, created in 1935, has a membership of more than 2,000 counties representing over 80 percent of the nation's population. NACo is the only national organization in the United States that represents county governments. It provides legislative research and technical assistance to counties and serves as a national advocate for counties before the executive, legislative, and judicial branches of the federal government.

Amici's members have a vital interest in protecting local governments' authority to acquire, manage, and sell property in the manner that best promotes the interests of

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

the public. Those interests are directly implicated by the questions presented in the petition.

SUMMARY OF ARGUMENT

For hundreds of years, local governments throughout the country have been securing limited easements authorizing pedestrian passage across private property. *See, e.g., Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 & n.1 (1987) (recognizing that passage-only easement sought by government commission was "a classic right-of-way easement"). Such easements facilitate access to businesses, beaches, and parks. *See, e.g., id.* at 834-35. Until the Tenth Circuit issued its decision in this case, local governments had every reason to believe that private landowners who agreed to convey such limited-purpose easements could retain the authority to restrict expressive activity on their property. That is no longer true.

Under the Tenth Circuit's analysis, a pedestrian passage easement can subject a private landowner's restrictions on speech to First Amendment scrutiny when the easement is "intended to provide passage through, not to, [the private] property." Pet. App. at 26a. By resting its First Amendment analysis on the "similarity" of a pedestrian passage easement across private property to "public sidewalks"—despite the "city's express intent not to create a public forum"—the Tenth Circuit has fundamentally misconstrued this Court's precedents, issued a decision in conflict with the governing standards in other jurisdictions, and created substantial uncertainty that directly impairs the ability of *amici*'s members to negotiate real estate transactions with private landowners. *See* Pet. App. at 28a. At its core, the decision below fundamentally contradicts two key principles of property law: (1) that an easement created by express grant is limited to the purposes and uses established by the precise terms of the grant and (2) that

the owner of an easement is entitled to use the property only to the extent reasonably necessary to accomplish the express purposes set forth in the grant.[2]

This Court should grant certiorari. Resolution of the questions presented in the petition is especially important because "[t]his Court has traditionally recognized the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).[3]

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE LEGAL UNCERTAINTY CREATED BY THE DECISION OF THE TENTH CIRCUIT

A. The Tenth Circuit's Decision Has Created Substantial Uncertainty By Disregarding The Lines Drawn By This Court's Precedents

Prior to the decision below, local governments were able to rely on certain bedrock First Amendment principles established and reaffirmed by this Court when negotiating real estate transactions with private parties. Under this Court's precedents, "the constitutional guarantee of free

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[2] *See, e.g.*, Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 8:02[1], at 8-3 (rev. ed. 1995) ("When precise language is employed to create an easement, such terminology governs the extent of usage."); *Restatement (Third) of Property: Servitudes* § 1.2(1) & cmt. d (2000) (noting that owner of an easement "is entitled to make only the uses reasonably necessary for the specified purposes" set forth in the grant); *Labrum v. Rickenbach*, 711 P.2d 225, 227 (Utah 1985) ("[T]he law in this state is plain: A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument.").

[3] *Amici* share petitioner's view that it would be appropriate to grant, vacate, and remand the decision if this Court resolves the public forum issue presented in *Virginia v. Hicks*, 123 S. Ct. 990 (2003) (granting certiorari). *See* Pet. at 17-19.

expression has no part to play" when a private landowner permits pedestrian access to its property on terms that restrict speech,[4] unless "the State has attempted to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties."[5] The Court of Appeals' failure to adhere to these settled principles has circumscribed the legitimate authority of local governments to secure passage-only easements in the Tenth Circuit and has created uncertainty concerning the authority of local governments throughout the country.[6]

One of the fundamental flaws in the Tenth Circuit's analysis is its application of public forum principles to restrictions on expressive conduct imposed by a private landowner on its own property—conduct beyond the reach of the First Amendment. Under the express terms of the limited easement, the Church—not the City—imposed the speech restrictions at issue here. *See* Pet. App. at 89a (warranty deed stating that the Church possessed the right to deny access to persons engaging in expressive activity inconsistent with the religious nature of the property).

This Court has repeatedly explained that the First Amendment is only implicated when restrictions on speech are imposed by (or on behalf of) the government. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (holding that

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[4] *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976).

[5] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 n.7 (1982).

[6] *See, e.g.*, Molly McDonough, *Defining a Public Space: Courts Interpret the Meaning of "Traditional Public Forum,"* 89 A.B.A.J. 24 (2003) (noting unsettled state of First Amendment law in private-public property deals and specifically recognizing disparate results reached in the decision below and *Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Department of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002)).

picketers at private shopping mall could be arrested for trespass without implicating First Amendment because "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state"); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (noting that First Amendment's free speech guarantees "guard only against encroachment by the government and 'erec[t] no shield against merely private conduct'" (citation omitted) (alteration in original)).

Moreover, this Court explicitly rejected the premise that private parties who allow public passage across their property should be subject to the strictures of the First Amendment. Although this Court initially concluded in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 318-20 (1968), that private property should be considered a public forum where the property was "'freely accessible and open to the people in the area and those passing through'" (citation omitted), that interpretation of the First Amendment was short lived. Twice in the next decade—first implicitly, then explicitly—the Court reversed course and overruled *Logan Valley*, holding that the First Amendment does *not* apply to restrictions on expressive activity imposed by a private property owner who permitted public passage. *See Hudgens*, 424 U.S. at 517-18 (explaining that *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), implicitly overruled *Logan Valley*); *Lloyd Corp.*, 407 U.S. at 569 ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes."). The Tenth Circuit accordingly should have followed this Court's mandate that the First Amendment has "no part to play" in the decision of a private landowner to restrict expressive

conduct on property generally open to the public, including those "passing through." *Hudgens*, 424 U.S. at 519-21.

Nothing in this Court's cases suggests that a different outcome was required because the pedestrian passage at issue here was authorized by a limited purpose easement instead of a license issued by the landowner. *See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 829 (1996) (Thomas, J., concurring in part and dissenting in part) ("[O]ur cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest *consistent with the communicative purpose of the forum to be designated.*" (emphasis added)). The parties here specifically disclaimed an intent to create a public forum, and the warranty deed itself confirms that creation of a public forum was flatly inconsistent with the intended use of the property. Pet. App. at 87a-89a. Indeed, every Supreme Court case cited by the Tenth Circuit to justify its finding of a public forum burdened by the strictures of the First Amendment, save one inapplicable exception, involved restrictions on speech that were clearly and unequivocally imposed by the government—not by a private party.[7]

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[7] *See* Pet. App. at 11a-12a; *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669 (1998) (restriction imposed by state-owned public broadcaster); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 795 (1985) (restriction imposed by Executive Order); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1983) (restriction imposed by local school district); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 115-16 (1981) (restriction imposed by federal statute). The sole exception is *Marsh v. Alabama*, 326 U.S. 501, 502 (1946), which concerned the *sui generis* context of a company-owned town. The limited rule of *Marsh* plainly does not apply to the property at issue here. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 & n.8 (1978) (explaining that *Marsh* allows "'private property [to] be treated as though it were public" for purposes

There accordingly was no state action implicated in the Church's decision to restrict expressive conduct on the plaza. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (holding that there is no state action unless the "'State is *responsible* for the specific conduct of which the plaintiff complains'" (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).[8] Local governments and private landowners are nevertheless now confronted with the prospect that the First Amendment can govern expressive activity on a wide array of private property encumbered by limited-purpose easements.[9]

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of state action analysis only in "extraordinary circumstances'" where the property "'has taken on *all* the attributes of a town, *i.e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'"'" (citations omitted)).

[8] The district court opinion also confirmed that the City did not retain any involvement in the "maintenance or the operation of the Property." Pet. App. at 48a-49a & n.3 (footnote omitted); *see, e.g., Evans v. Newton*, 382 U.S. 296, 301 (1966) (state action found where transfer of property to private owner was sham designed to avoid constitutional prohibitions against discrimination and city exercised substantial management and control of property after transfer).

[9] The Tenth Circuit asserted that it was not adopting a bright line rule that would automatically convert all easements into public fora. *See* Pet. App. at 13a n.5. But the standards the court articulated, as well as the way those standards were applied to the facts of this case, create a substantial risk that many (if not most) pedestrian passage easements would be deemed to be public fora because of their functional "similarity" to "public sidewalks." Pet App. at 28a. If a right of way through a religious park, which is undefined by any metes and bounds, has sufficient "similarity" to a public sidewalk, then a court might also hold that any well-worn trail across private lands also has sufficient "similarity" to a sidewalk. And any easement that crosses private property and that previously had a sidewalk is virtually certain to constitute a public forum under the Tenth Circuit's standards. *See, e.g., id.*

B. The Decisional Conflicts Resulting From The Tenth Circuit's Opinion Create Uncertainty In The Realm Of Property Transactions Where Predictability Is Essential

The Tenth Circuit's decision squarely conflicts with the decision of the Nevada Supreme Court in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). *See* Pet. at 15-16. In contrast to the Tenth Circuit, the Nevada Supreme Court correctly recognized that, absent very special circumstances not present here, a private landowner does not "'st[an]d in the shoes of the State'" when it restricts the expressive activities of pedestrians who travel across its property pursuant to the terms of a public access easement. *S.O.C., Inc.*, 23 P.3d at 248 (quoting *Hudgens*, 424 U.S. at 519). In addition, the petition further demonstrates that the tests adopted and applied by the Tenth Circuit and by the Second Circuit[10] to determine whether property should be characterized as a public forum are irreconcilably inconsistent. Pet. at 8-14.[11]

As a consequence of these inconsistent standards, local governments can no longer accurately gauge whether a minimal government interest in private property—such as a pedestrian passage easement—will transform private property into a public forum without regard to the parties' intent. *Compare Hotel Employees & Restaurant Employees Union, Local 100 v. City of N.Y. Dep't of Parks*

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[10] *Hotel Employees*, 311 F.3d at 546-47, 552.

[11] The Second Circuit's decision in *Hotel Employees* could not be resolved on the question of State action also at issue in this case and *S.O.C., Inc.* because the public restrictions on expressive activity on the public plaza adjacent to the Lincoln Center were imposed on behalf of the city. *Hotel Employees*, 311 F.3d at 541 (noting that Lincoln Center was licensed to manage the public plaza "'on behalf of and as an agent of the City'" (quoting License Agreement)).

& Recreation, 311 F.3d 534, 546-47, 552 (2d Cir. 2002) (holding that the "physical characteristics" of the property and its surroundings, the uses of the property, the parties' intentions with respect to property, and all other "relevant factors" are probative of the public forum inquiry) *with* Pet. App. 21a-22a (ignoring parties' intentions with respect to the property, the characteristics and use of a large portion of the property and its surroundings, and physical changes to the park in finding a public forum).

This case provides a paradigm illustration of why reasonable certainty is so essential in the realm of real property transactions. Consistent with state property law and this Court's First Amendment precedents, the City negotiated a transaction with the Church to sell the property at issue for $8.1 million; to close the preexisting public forum; and to retain a limited pedestrian passage-only easement. It is undisputed that the Church would not have purchased the property if the City had retained a public forum on the property. *See, e.g.*, Pet. at 3. In good faith reliance on the enforceability of these provisions, the Church invested millions of dollars to destroy the physical remnants of the public forum and to create a new plaza infused with religious imagery. *Id.* at 3-5.

Transactions of this nature obviously cannot be unwound fairly or effectively. Local governments and landowners accordingly need greater certainty than the state of the law currently provides so that transactions can be negotiated on the basis of predictable rules.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TENTH CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE ABILITY OF LOCAL GOVERNMENTS TO MANAGE PROPERTY IN THE PUBLIC INTEREST

Local governments own millions of parcels of real estate criss-crossed by sidewalks, streets, and other public fora.[12] It is commonplace for the City to negotiate sales of these parcels to private parties and to acquire or retain easements for pedestrian passage across private lands. The standards established by the Tenth Circuit's decision adversely affect these important interests in three fundamental ways.

First, the decision below will inhibit the ability of local governments to secure passage-only easements for the benefit of the public even though such easements have long been a staple of private and public property transactions.[13] Under the Tenth Circuit's reasoning, the City had only two choices if the Church was unwilling to permit expressive activities on its property: it could forego the sale of the property or forego the pedestrian passage easement. This is

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[12] *See, e.g.*, William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. Ill. L. Rev. 521, 544 n.96 (1986) (noting that, at time of article, local and state governments owned approximately 136 million acres of property).

[13] Recognizing the established principle that local governments must have the power to manage their property to effect their valid policy goals, states like Utah authorize local governments to contract for property interests to the same extent as private individuals. *See, e.g.*, 69 C.J.S. *Municipal Corporations* § 881 (1999) (noting that a local government may "acquire and hold all such property, real and personal, as may be necessary to the proper exercise" of its municipal functions); Utah Code Ann. § 10-8-2(1)(c)-(d) (providing municipal governments express authority to "purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the municipality," and to "do any other thing in relation to [such] property that an individual could do").

not a sensible rule, particularly where, as here, there were miles of sidewalks in the immediate vicinity available to the public for expressive activity. *See, e.g.*, Pet. App. at 106a. A rule that permits the closure of the public forum but prevents the retention of an easement for passage does not serve the public interest.

Second, the standards established by the Tenth Circuit's decision will inevitably depress the value of local government property interests. Properties that must be transferred with public forum encumbrances are plainly worth far less. Private landowners are often willing to permit pedestrian passage, but few are interested in the disruptions attendant to demonstrations, picketing, and leafleting. *See, e.g., Lloyd Corp.*, 407 U.S. at 555-56, 570 (rejecting First Amendment challenge to private landowner's prohibition against handbilling, an activity "likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purposes" and "atmosphere" of the property); *see also Frisby v. Schultz*, 487 U.S. 474, 486-87 (1988) (noting that picketing of a private landowner is frequently "offensive and disturbing" and can have a "devastating effect" on its legitimate "'interest in the quality of [its] environment,'" particularly because the audience is captive (citation omitted)).

Third, the standards adopted by the Tenth Circuit are unworkable because they require local governments to become entangled with the speech-related activities of the owner. As the context of this case graphically demonstrates, the Tenth Circuit's decision raises the specter of a different First Amendment violation. By forcing the City to police speech on a religious plaza, the Tenth Circuit standards are generating the very type of "excessive government entanglement with religion" that

renders government action violative of the Establishment Clause. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 584-85 (1992) (restating test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). At the very least, the relationship required by the decision below may foster the perception that the City has endorsed the Mormon faith. *See, e.g., County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

In sum, the decision below does not cure constitutional problems. It creates them.

CONCLUSION

Amici respectfully urge this Court to grant the petition for a writ of certiorari and to reverse the decision of the court of appeals.

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No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF UTAH, ALABAMA, KANSAS, NEBRASKA, TEXAS, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
REASONS FOR GRANTING THE PETITION	2
I. THE TENTH CIRCUIT'S DECISION DISRUPTS STATE PROPERTY LAW AND SIGNIFICANTLY IMPAIRS THE TRADITIONAL POWER OF STATE GOVERNMENTS TO SELL PUBLIC PROPERTY AND TO PURCHASE OR ACQUIRE EASEMENTS OVER PRIVATE LANDS	2
A. The Decision Below Disrupts Settled Principles Of State Property Law That Give State Governments The Power Both To Sell Public Property And To Limit The Burdens Imposed On Private Property Owners By Public Easements	4
B. The Decision Below Will Significantly Hinder State Governments In Selling Public Lands And Purchasing Access Easements Over Private Property	10
II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICTS IDENTIFIED IN THE PETITION AND TO CLARIFY HOW GOVERNMENT CAN PROPERLY CLOSE A PUBLIC FORUM	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Big Cottonwood Tanner Ditch Co. v. Moyle, 159 P.2d 596 (Utah 1945), *modified on other grounds*, 174 P.2d 148 (Utah 1946) 8

Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation, 311 F.3d 534 (2d Cir. 2002) 13

International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) 12, 13

Labrum v. Rickenbach, 711 P.2d 225 (Utah 1985) 6, 8

S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243 (Nev. 2001) 7

Stevens v. Bird-Jex Co., 18 P.2d 292 (Utah 1933) 6

Weggeland v. Ujifusa, 384 P.2d 590 (Utah 1963) 5

Wood v. Ashby, 253 P.2d 351 (Utah 1952) 6

STATUTES

Ala. Code § 9-15-72 4

Kan. Stat. Ann. § 32-804 4

§ 68-423a 4

Neb. Rev. Stat. § 39-1325 4

Tex. Gov't Code Ann. § 2166.052 4

Utah Code Ann. § 10-8-2(1)(c) & (d) 9

§ 53C-4-101(1)(a) 4

§ 53C-4-102(2)(a) 4

§ 65A-4-1(1) 4

W. Va. Code § 17-2A-19 4

OTHER AUTHORITY

Restatement (Third) of Property: Servitudes (2000) 4, 5, 6, 7, 8

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES Page

1 Dan B. Dobbs, *Dobbs Law of Remedies* (2d ed. 1993) 6

Jesse Dukeminier & James E. Krier, *Property* (2d ed. 1988) 5

STATEMENT OF INTEREST

Amici Curiae are the States of Utah, Alabama, Kansas, Nebraska, Texas, and West Virginia (collectively, *Amici* or "*Amici* States"). They each have significant public land holdings, both urban and rural. The land holdings of *Amici* and their municipal subdivisions are vast and varied, and constitute vitally important State assets. They include government buildings and their grounds; public streets and sidewalks; urban parks, open spaces, and other urban lots; and State parks, recreation trails, and memorial areas, to name but a few. For example, nationwide there are approximately 5,616 State parks totaling 13 million acres and 3,963 State trails encompassing 26,337 miles.

Amici have a strong interest in preserving the value of these assets and the ability of States to encourage economic development, fund public education, and increase public revenues through the sale of state-owned real estate. State and local governments are vested with the power to sell public lands for the benefit of their citizenry, and they regularly do so. It is not uncommon in connection with such sales for States and their municipalities to reserve limited easements or impose other regulations that promote the public good by ensuring public access, much as occurred here.

The decision below creates significant uncertainty and confusion about the power of State governments to sell public forum property, or to guarantee public access to private property, without maintaining or creating public forum rights. This Court's review is necessary to clarify public forum law and to ensure that the market value of vital public assets and the ability to obtain public access rights to private property are not destroyed by the Tenth Circuit's overly rigid interpretation of public forum doctrine.

REASONS FOR GRANTING THE PETITION

In addition to the reasons set forth in the Petition, this case warrants the Court's review because it seriously disrupts the ability of State governments to manage their vast land holdings in the best interests of the public. To raise funds, promote development and renewal, and advance a variety of other important governmental interests, State governments frequently sell public land to private individuals. In connection with such sales, it is not uncommon for the government to reserve (or later acquire) limited public access easements. These sales often involve sections of public parks, streets, and sidewalks that have traditionally been considered public forums. The ability of the government to completely close such public forums is essential to the sale of public land because private buyers will not pay full market value for a protest zone – indeed, many will not pay anything at all.

In the decision below, the Tenth Circuit established a test for determining whether a public forum continues to exist on former government property. However, that test is so narrow in its focus and ignores so many highly relevant factors that it will inevitably result in many private properties purchased from the government being declared public forums. The decision below is certain to hinder or prevent land sales that are clearly in the best interest of the public. More broadly, review is warranted to resolve the conflicts and clarify the substantial confusion that the court below has created over the proper standard for terminating a public forum.

I. THE TENTH CIRCUIT'S DECISION DISRUPTS STATE PROPERTY LAW AND SIGNIFICANTLY IMPAIRS THE TRADITIONAL POWER OF STATE GOVERNMENTS TO SELL PUBLIC PROPERTY AND TO PURCHASE OR ACQUIRE EASEMENTS OVER PRIVATE LANDS.

In all material respects, the transaction between the City and the Church is unremarkable. The City closed a segment

of a public street, sold it for fair market value to a private entity for development, and retained an easement preserving a limited right allowing the public to traverse the property. In one form or another, such transactions are common. As some of the largest landowners in the country, State governments routinely sell portions of streets, parks, and other public lands to private entities to advance a variety of important government interests. In connection with such sales, governments frequently retain public access easements or impose public access conditions. Likewise, governments often purchase or acquire limited access easements from private landowners to facilitate public access and passage (both pedestrian and vehicular) to adjoining government properties or places of public interest. As a result, public access easements over private property are common, especially throughout the western United States.

What *is* remarkable, however, is the Tenth Circuit's unprecedented holding that – regardless of the intent of the government and the private landowner, regardless of the terms of an easement, and regardless of the nature and use of the burdened land and the surrounding properties – a simple easement expressly limited to public access and passage can transform otherwise private property into a public forum. Review is necessary because this decision disrupts well-established principles of property law and creates uncertainty and practical difficulties for State governments. At a minimum, given the very real risk that a government land transaction will create a disruptive public forum, any such transaction in the Tenth Circuit, especially one that involves a public access easement, will now be much more difficult and expensive. In many cases, such transactions will now be impossible.

A. The Decision Below Disrupts Settled Principles Of State Property Law That Give State Governments The Power Both To Sell Public Property And To Limit The Burdens Imposed On Private Property Owners By Public Easements.

There can be no doubt that a State government, like any other property owner, generally has the right to sell public property to a private purchaser. See Utah Code Ann. § 65A-4-1(1) ("All state agencies may acquire land . . . and are authorized to sell, lease or otherwise dispose of land no longer needed for public purposes . . . ."); *id.* § 53C-4-101(1)(a) (requiring director of School and Institutional Trust Lands Administration to establish criteria for the "sale, exchange, lease or other disposition or conveyance of trust lands"); *id.* § 53C-4-102(2)(a) (requiring SITLA director to determine "whether disposal or retention of all or a portion of a property interest in trust lands is in the best interest of the trust").[1] And, like any other property owner, a State government, under bedrock principles of property law, has the power to limit the scope of a government-owned easement to specified subjects. See *Restatement (Third) of Property: Servitudes* § 2.18(2) & cmt. b (2000) ("the right to control a [government-owned] servitude for the benefit of the public is located in the state," and not in individual citizens who may disagree with the government's property management style).

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[1] See also Ala. Code § 9-15-72 (state agencies are authorized to sell real property holdings through the Lands Division of the state Department of Conservation); Kan. Stat. Ann. § 32-804 (state park and resources authority is authorized to dispose of real property or any interest therein); *id.* § 68-423a (state Secretary of Transportation is authorized to dispose of by sale any real property formerly a road or highway); Neb. Rev. Stat. § 39-1325 (state Department of Roads is authorized to sell "any part of or any interest in real property" that it holds); Tex. Gov't Code Ann. § 2166.052 (state legislature may authorize state general services commission to sell real property holdings of the state); W. Va. Code § 17-2A-19 (state Division of Highways may sell real property, "or any interest or right in the property," that it holds).

That is true, moreover, whether the state government acquires an easement from an existing property owner, or, as in this case, simply retains an easement as part of a sale of public property to a private entity. See Jesse Dukeminier & James E. Krier, *Property* 834 (2d ed. 1988) (no legal difference between easements created by reservation and those created through an independent conveyance).

Nevertheless, the decision below essentially declares irrelevant the undisputed fact that the deed creating the easement here was specifically drafted to preclude the interpretation that it allows the public to use the property for expressive purposes. In refusing to give any weight to that critical fact, the Tenth Circuit has significantly disrupted basic principles of property law governing public easements – much to the detriment of state and local governments throughout that court's territorial jurisdiction.

1. One of the bedrock principles of State property law is that an easement creates "a nonpossessory right to enter and use land in the possession of another" and that it only "obligates the possessor not to interfere with the uses authorized by the easement." *Restatement (Third) of Property: Servitudes* § 1.2(1). The benefit associated with an easement is considered a "nonpossessory" interest in land because it "generally authorizes limited uses of the burdened property *for a particular purpose*." *Id.* § 1.2 cmt. d (emphasis added). Moreover, while the owner of an easement "is entitled to make *only* the uses reasonably necessary for the specified purpose," the owner of the possessory or "servient" estate "retains the right to make all uses of the land that do not unreasonably interfere with exercise of the rights granted by the" easement. *Id.* (emphasis added); see *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963) ("The accepted rule is that the language of the grant is the measure and the extent of the right created; and that the easement conveyed should be so construed as to burden the [possessory] estate only to the

degree necessary to satisfy the purpose described in the grant.").

Thus, under settled state-law principles, an easement is a limited interest in land "that carves out specific uses for the . . . beneficiary," but which allows "[a]ll residual rights [to] remain in the possessory estate." *Restatement (Third) of Property: Servitudes* § 4.9 cmt. c (emphasis added); *accord* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 5.7(6), at 784 (2d ed. 1993) ("An easement in land is a right to use the land for limited purposes, not a right of possession."). In other words, the law presumes that the owner of the possessory estate retains every right not explicitly granted to the owner of the easement. See *Labrum v. Rickenbach*, 711 P.2d 225, 227 (Utah 1985) ("[T]he law in this state is plain: A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument.").[2] Were it otherwise, property owners would be most reluctant to allow easements on their property, particularly easements in favor of a government.

2. Disregarding the plain terms of the easement and these bedrock principles of State property law, the decision below invokes the easement at issue here as justification for imposing a disruptive public forum on the Church Plaza. This is obviously a significant intrusion into the City's prerogative to dispose of its own property as it sees fit. But it is also an enormous intrusion into the State's authority to establish property-law principles that will best serve the interests of the

[2] Moreover, where disputes arise as to the meaning of language granting an easement, courts construe that language to effectuate the apparent intent of the parties, paying particular attention to the overall purpose of the transaction. See *Wood v. Ashby*, 253 P.2d 351, 353 (Utah 1952) ("It is . . . established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed. . . . Further, when the deed creates an easement the circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered."); *accord Stevens v. Bird-Jex Co.*, 18 P.2d 292, 294-95 (Utah 1933). The Tenth Circuit's decision vitiates this important principle as well.

State and its citizens. Indeed, unless the property-law principles adopted by Utah and virtually all other States are to be overridden entirely by the First Amendment, the easement at issue here is simply too limited a property interest to give the City's pedestrians the same rights on the Church Plaza as they have on public sidewalks.

First, nothing in the City's easement grants any free expression rights to members of the public, either expressly or by necessary implication. As noted, under settled property-law principles in general, and Utah property law in particular, the holder of an easement "is entitled to make *only* the uses reasonably necessary for the *specified* purpose." *Restatement (Third) of Property: Servitudes* § 1.2 cmt. d (emphasis added). The only use "specified" in the easement is pedestrian crossing. The ability to protest, demonstrate, distribute literature, and so forth is obviously not "reasonably necessary" for pedestrian crossing. There is no plausible argument that by its nature a pedestrian access easement includes the right to engage in the full range of expressive activities associated with a public forum.

In short, as the Nevada Supreme Court affirmed in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001) (plurality opinion), under settled State law, privately owned property "does not lose its private nature because the public traverses upon it," and the "existence of [a pedestrian access] easement alone, without more, does not transform private property into a public forum." *Id.* at 247, 248. That is because, as noted, "'an easement obtained by a governmental entity for a public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained.'" *Id.* at 247 (quoting *Dixon v. City of Phoenix*, 845 P.2d 1107, 1114 (Ariz. Ct. App. 1992)). Accordingly, such an easement "is limited to pedestrian uses of the sidewalk to travel from point A to point B." *Id.* The Tenth Circuit's decision is a frontal assault on that settled State-law principle.

Even worse, the Tenth Circuit's decision deprives State and local governments of the freedom to determine by contract the scope of the easements they wish to obtain. In this case, the deed expressly states that the scope of the City's property interest does not include the right of the public to demonstrate, picket, distribute literature, or engage in other activities that would be protected by the First Amendment if carried out on public property. Indeed, the easement by its terms is limited to "pedestrian access and passage *only*." Pet. App. 87a (emphasis added). And it expressly states that nothing in it "shall be deemed to create or constitute a public forum, limited or otherwise." *Id.* at 88a, 89a. Because the language in the deed "leaves no doubt as to its meaning," the courts are powerless under settled Utah law (and the laws of virtually all other States) to "expand the terms of the easement." *Labrum*, 711 P.2d at 227. Here again, the Tenth Circuit's decision simply overrides settled State law.[3]

Finally, the decision below deprives State and local governments of the ability to control the interpretation and operation of their own easements. It is hornbook law that where, as here, the parties have not indicated otherwise, "the right to control a [government-owned] servitude for the benefit of the public" – *i.e.*, the "rights to transfer, terminate, . . . dispose of the servitude benefit, [and] to manage the servitude" – "is located in the state." *Restatement (Third) of*

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[3] Even if the deed were ambiguous on this point, the court below should have construed it as not creating any expressive rights because to conclude otherwise is to disregard the settled proposition that an easement cannot be construed in a way that would be incompatible with the primary use of the possessory estate. See *Big Cottonwood Tanner Ditch Co. v. Moyle*, 159 P.2d 596, 597 (Utah 1945), *modified on other grounds*, 174 P.2d 148 (Utah 1946); *Restatement (Third) of Property: Servitudes* § 4.1. In this case, it is undisputed that the primary use of the Church's possessory estate is that of a religious plaza. And protests against the sponsoring religion would obviously be incompatible with that primary use. Nevertheless, the court below ignored these basic principles of property law and held that the easement created a public forum.

Property: Servitudes § 2.18(2) & cmt. b. By ignoring settled principles of property law and rejecting the City's reasonable construction of the limits of its own easement, the court below not only deprived the City of that right in this case, but has also, by implication, deprived other States and cities of that same right in future transactions.

Indeed, one of the ironies of the Tenth Circuit's decision is that it leaves State and local governments with far less control over property transactions than private parties. As noted, State law typically affords State and municipal governments express statutory authority to "purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the municipality," and to "do *any other thing in relation to [such] property that an individual could do*." Utah Code Ann. § 10-8-2(1)(c) & (d) (emphasis added). Of course, individuals would have the ability to define and limit the terms of an access easement that benefits one and burdens the land of the other. But the Tenth Circuit has now denied that same power to a government landowner. To the contrary, it left the City of Salt Lake (and by implication other State and local governments) with an all-or-nothing proposition: either retain the easement and manage a full-blown public forum on private property or else relinquish the easement and forfeit any guarantee of public access. Pet. App. 9a-31a.

3. It is important to remember, moreover, that the decision below is *not* limited to extraordinary or problematic situations, such as where the government's actual purpose in entering into a property transaction is to suppress free speech or where no adequate alternative avenues of communication exist. It is undisputed that the City had no such intent and that there are large and effective areas for public protest and expression on the wide, public-forum City sidewalks immediately adjacent to the Plaza.

Rather, the decision below means that – regardless of the unequivocal terms of the easement, the clear contrary intent of the government and the private party, and the magnitude of

the abridgment of private property rights – the First Amendment automatically injects an irrevocable public forum clause in most government-owned public access easements. To be sure, the court of appeals stated that its holding did not mean that every easement creates a public forum. Pet. App. 13a n.5. But the court's narrow analysis, which (as explained in the Petition) excludes the most relevant considerations, would in most cases ensure that very outcome.

For all these reasons, the decision below represents a massive intrusion into State property law and the prerogatives of State and local governments to manage their affairs in the interests of their citizens. Accordingly, it warrants full review by this Court.

B. The Decision Below Will Significantly Hinder State Governments In Selling Public Lands And Purchasing Access Easements Over Private Property.

Amici States are also concerned about the decision below because of its practical impact on their ability to sell public lands and to purchase access easements. Robust public forums are no doubt vital to a democracy, but very few people desire to host one on their own private property. As this case demonstrates, the public and expressive nature of a public forum – the cacophony of the marketplace of ideas – can be totally inconsistent with the quiet enjoyment of private property. Thus, any purchaser will demand a significant discount for land burdened by a public forum.

Many States, including these *Amici*, own large tracts of open-spaces land as well as numerous discrete parcels within urban areas. Such properties are extremely valuable public assets. Governments sell or trade public lands to raise revenue, promote development and urban renewal, create buffers between different land-use zones, and to acquire more desirable properties. Like any landowner, governments seek to obtain full market value for their lands. Where needed, they

also seek to maximize the benefit to the public by ensuring public access after land is sold.

In other contexts, many States also employ access easements to preserve public access to beaches, parks, and other public lands without obligating the government to bear all the burdens of private ownership. They help cities facilitate pedestrian traffic. They exist not only over undeveloped land but through private gardens, backyards, and even buildings.

The decision below prejudices governments at all levels in the sale of public lands. By almost ensuring that a public forum will exist on private property merely because public access is guaranteed, the court below has forced one of two choices upon State governments: they can either abandon the benefits of legally guaranteed public access and sell the land unencumbered for full fair market value, or they can ensure public access and sell the land at a steep discount. Either way, the public loses.

For the same reasons, State governments within the Tenth Circuit will have great difficulty acquiring public access easements over private property. Many private landowners will not be willing to grant such easements to governments given the disruption a public forum can cause. Others will demand a premium to compensate for the risk and hassle. As a practical matter, the decision below will often make it impossible for State governments to reserve or obtain public access easements over private land.

Ironically, moreover, the decision below will result in very little if any additional speech. It will instead result in less public access and less public revenue.

For all these reasons, the decision below improperly and unnecessarily strips State governments of the power to structure sales of public lands to maximize the public's benefit. For that reason as well, it merits this Court's full attention.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICTS IDENTIFIED IN THE PETITION AND TO CLARIFY HOW GOVERNMENT CAN PROPERLY CLOSE A PUBLIC FORUM.

The doctrinal conflicts identified in the petition are also of great concern to *Amici* and likewise merit this Court's review. In particular, the Petition sets forth the stark conflicts that exist (1) between the Tenth Circuit and the Second Circuit over the proper analysis for determining whether property subject to public access rights constitutes a public forum, and (2) between the Tenth Circuit and the Nevada Supreme Court over whether a walkway on private property subject to a simple public access easement can be deemed a public forum for First Amendment purposes. Although the decision below also conflicts with the clear import of this Court's public forum cases, this Court has never specifically addressed the precise issue of how government can constitutionally terminate a public forum and sell the property to a private owner. Nor has it ever addressed whether, or under what circumstances, a public access easement can give rise to a public forum on private property. These issues are of great and recurring importance to State governments as they deal with land sales and public access issues.

Perhaps the most straightforward and logical statement of how government can terminate a public forum is contained in Justice Kennedy's concurrence in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 699-700 (1992). Justice Kennedy stated that a public forum can be closed in one of three ways:

> [T]he government always retains authority to close a public forum, by [1] selling the property, [2] changing its physical character, *or* [3] changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.

Id. (Kennedy, J., concurring) (emphasis added).

The Second Circuit addressed essentially the same factors in determining whether the government-owned Lincoln Center Plaza constituted a public forum and concluded that it did not. *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 546-47, 552 (2d Cir. 2002). But the Tenth Circuit here took a starkly different approach. The record in this case is clear that the City satisfied all of the factors identified by Justice Kennedy in *Lee*. The property was sold to the Church for fair market value, its physical character was dramatically changed, and its principal use was altered (from ordinary street and sidewalk use to a religious plaza). Each factor is independently sufficient to terminate a public forum. Nevertheless, the Tenth Circuit virtually ignored these factors and focused narrowly on the nature of the government's property interest to the exclusion of everything else. Pet. App. 22a.

This Court's review is essential to resolve a classic conflict in an important area of the law. In *Lee*, Justice Kennedy outlined a test that concisely sets forth what is necessary to close a public forum. In *Hotel Employees*, the Second Circuit employed the same analysis to determine that an urban plaza was not a public forum. But in this case, the Tenth Circuit adopted a different analysis that reached the opposite conclusion under very similar facts. Certiorari is necessary to establish which analysis is correct, or to provide some other test to guide both the lower courts in deciding such cases and State and local governments in fashioning property transactions. Review is also necessary to resolve the uncertainty that the decision below has created over whether public access easements necessarily create public forums on private property.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

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IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,
Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE VENETIAN CASINO RESORT IN SUPPORT OF PETITIONER

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION WHETHER, OR UNDER WHAT CIRCUMSTANCES, A PRIVATE SIDEWALK IS A PUBLIC FORUM 3

A. Lower Courts Reach Conflicting Results on Whether a Private Sidewalk is a Public Forum 3

B. Lower Courts Use Conflicting Approaches to Analyze Whether a Private Sidewalk is a Public Forum 8

C. The Petition Should be Held Pending the Decision in *Virginia v. Hicks* 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Craigo v. Circus-Circus Enters., Inc., 786 P.2d 22 (Nev. 1990) 8

First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002) 5, 6, 10

Frisby v. Schultz, 487 U.S. 474 (1988) 3, 9

Green v. Spock, 424 U.S. 828 (1976) 9

Hicks v. Commonwealth, 548 S.E.2d 249 (Va. Ct. App. 2001) 4, 5, 11

Hudgens v. NLRB, 424 U.S. 507 (1976) 9

International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) 9, 10

Marsh v. Alabama, 326 U.S. 501 (1946) 7, 8, 10, 11

S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243 (Nev. 2001) 7, 8, 11

United States v. Kokinda, 497 U.S. 720 (1990) 5

Venetian Casino Resort v. Local Joint Executive Board, 257 F.3d 937 (9th Cir. 2001) 1, 6, 7, 10

Virginia v. Hicks, 123 S. Ct. 990 (2003) 2

OTHER AUTHORITIES

29 U.S.C. § 151 1

Reply Br. of Pet., *Virginia v. Hicks* (No. 02-371) 12

INTEREST OF *AMICUS CURIAE*[1]

The Venetian Casino Resort owns and operates a luxury hotel-casino located in Las Vegas, Nevada, and has constructed a private sidewalk on its property. As the owner of a private sidewalk, Venetian is interested in the outcome to the legal question presented by the case below, namely, when—if ever—is a private sidewalk a public form? Venetian was a party in *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937 (9th Cir. 2001), in which the Ninth Circuit held that Venetian's private sidewalk was a public forum. Venetian is now subject to this erroneous ruling, which has ongoing consequences for Venetian in its relationships with union members who wish to picket on its sidewalk. Venetian therefore has an interest in the outcome of the case below and this Court's proper resolution of the question presented.

Venetian's interest in whether the owner of a private sidewalk can regulate the speech thereon extends beyond the Ninth Circuit's erroneous holding. Because of Venetian's attempt to assert its rights as a private property owner, it is currently forced to defend itself before the National Labor Relations Board against claims that it engaged in unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Specifically, third parties sought to picket on Venetian's private property, and Venetian notified the picketers that they were trespassing on private property and unsuccessfully requested police assistance in removing

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[1] Pursuant to Rule 37.6 of the Rules of this Court, Venetian Casino Resort states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent are being filed along with this brief with the Clerk of this Court.

the trespassers who remained. As a consequence of those actions—merely asserting its right to regulate the speech by third parties on its own private property—Venetian has been charged with committing unfair labor practices, and must now defend itself in currently ongoing proceedings before the NLRB. Venetian therefore has a continuing interest in the outcome of the legal question presented in this case to vindicate its rights as a private landowner whose property is not a public forum.

SUMMARY OF ARGUMENT

There is disagreement among lower federal and state courts on a single discrete but recurring issue: when—if ever—is a *privately* owned street or sidewalk a public forum? Three courts, including the court below, have held that private sidewalks are public fora; in almost identical circumstances, one court has held to the contrary. That conflict as to outcome reflects confusion as to governing legal standards. Some courts analyze the question under the "public forum" doctrine, while others treat the issue as one of "state action." And, as explained below, that choice of analysis may well determine the outcome. Until this Court provides guidance on the proper analysis, the courts will continue to issue conflicting and ill-conceived decisions.

The Court has already granted certiorari in *Virginia v. Hicks*, *see* 123 S. Ct. 990 (2003) (granting certiorari in No. 02-371), which raises the very question at issue here. This case should, at a minimum, be held pending the resolution in *Hicks*. And in resolving *Hicks*, this Court should be cognizant of the complexity and nuances of the private-sidewalk issue as discussed below. If *Hicks* does not resolve, or only partially resolves, the issue, then the Court should grant this petition for a writ of certiorari to bring much needed clarification to this area of the First Amendment.

Whether a private sidewalk is a public forum has critical importance for the rights of private landowners to control

speech on their own property. The confusion on this issue has mistakenly led some courts—including the Tenth Circuit below—to disregard the fundamental constitutional prerogative of a private landowner to decide what speech he or she will permit on his or her premises, by treating the private landowner's property as a public forum. This Court should resolve the confusion, provide much needed guidance to lower courts, and ensure that private property owners' liberties are protected.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION WHETHER, OR UNDER WHAT CIRCUMSTANCES, A PRIVATE SIDEWALK IS A PUBLIC FORUM

A. Lower Courts Reach Conflicting Results on Whether a Private Sidewalk is a Public Forum

All courts agree that a *publicly* owned street or sidewalk is a public forum. *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988). But when it comes to a *private* sidewalk, judges are deeply divided. The Tenth Circuit below held that a private sidewalk was a public forum. A panel of the Ninth Circuit did the same, but only by a divided two-to-one vote. An *en banc* panel of the Virginia Court of Appeals was even more deeply divided, with a 6-to-5 majority holding that a private sidewalk was a public forum. And the Nevada Supreme Court, also divided, reached the opposite conclusion, holding that the private sidewalk in question was *not* a public forum.

Each case arises from the same or very similar circumstances and implicates the same legal issues. In each case, there is a privately-owned sidewalk. In each case, the sidewalk in question has physical characteristics marking it as private property. In each, the public has a right-of-way easement to travel on the private sidewalk. And in each

case, the legal question is whether that private sidewalk is a public forum.

1. *Virginia v. Hicks.* In *Virginia v. Hicks*, the *en banc* majority of the Virginia Court of Appeals held that a private sidewalk was a public forum. In that case, the City of Richmond privatized the streets and sidewalks surrounding a public housing project by deeding them to the Richmond Redevelopment and Housing Authority ("Authority"), a governmental entity that acts in the capacity of a private landlord rather than as sovereign. *Hicks v. Commonwealth*, 548 S.E.2d 249, 251 (Va. Ct. App. 2001) (en banc). The sidewalk's physical characteristics were changed through the posting of "'private property, no trespass' signs." *Id.* The public retained a right-of-way across the private sidewalk. *Id.* ("the sidewalks were open to access by the public"). And "[t]he critical issue" in the case was "whether the 'privatized' streets and sidewalks are public and as such are a 'traditional public forum,' or whether they are 'private' and, thereby, a 'nonpublic forum.'" *Id.* at 253.

The majority concluded that the private sidewalk was a public forum. The court relied on the fact that the sidewalks were still used for the same public function—*i.e.*, as a public throughway—as they had been prior to privatization, as well as the absence of physical changes more significant than the posting of signs. *See id.* at 254 ("the streets appear no different from other streets in Richmond," and "serve the same function" as they did "prior to 'privatization'"). The majority also found the change in legal title—*i.e.*, the privatization—was insufficient to change the sidewalk's public forum status. *See id.* at 254 ("The City of Richmond is not permitted to transform the public streets and sidewalks . . . into private, non-public property simply by passing an ordinance declaring them closed [and] conveying them to another governmental entity.").

But the court was deeply divided. Five dissenting Judges focused not only on the posting of signs, but also on the legal conveyance of title to the Authority. *See id.* at 260 (Humphreys, J., dissenting) (the property "has been deeded from the City" to the Authority and no-trespassing signs "clearly indicated that the street and sidewalks had been privatized"). For them, continued public access was not enough to establish a public forum under the First Amendment. *See id.* (quoting *United States v. Kokinda*, 497 U.S. 720, 729 (1990)) ("even though sidewalks 'may be open to the public, [that] fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment'").

2. *First Unitarian.* The Tenth Circuit below also held that a private sidewalk was a public forum. The circumstances parallel those in *Hicks*. As in *Hicks*, the sidewalk at issue is privately-owned. *See First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th Cir. 2002); Pet. App. 2a. Also as in *Hicks*, the sidewalk's physical characteristics were changed to mark it as private property—here, by converting the area into "an attractive plaza" with "walking areas interrupted by planters, benches, and waterfalls, a large reflecting pool, and changes in grade." *Id.* at 1119; Pet. App. 6a. And, once again, the public had a right-of-way across the private sidewalk. *Id.* at 1118-19; Pet. App. 4a-5a. Finally, the legal question at issue was framed as it had been in *Hicks*: whether a private sidewalk is a public forum. *Id.* at 1121; Pet. App. 10a ("[t]he City and LDS Church maintain the easement cannot be a public forum").

The court below held that the private sidewalk was a public forum. Again, the court focused on the fact that the sidewalk continued to serve the public function of a pedestrian throughway. *See id.* at 1126; Pet. App. 18a ("[t]he actual purpose . . . here is a pedestrian throughway for the general public"). Nor did the court find the change in legal title

to be persuasive. *See id.* at 1124; Pet. App. 15a ("The government cannot simply declare the First Amendment status of property regardless of its nature and its public use."). And it was important to the court that the property had previously been publicly held: "the easement remains a public forum precisely because the property was previously a public forum and it has not been sufficiently altered to destroy that status." *Id.* at 1130; Pet. App. 25a-26a.

3. *Venetian.* The Ninth Circuit has also held that a private sidewalk was a public forum. In *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937, 939 (9th Cir. 2001), like the two cases just discussed, the sidewalk at issue is privately-owned. *See id.* at 943 ("In this case, the title to the property was held by the Venetian . . ."). And like those cases, the sidewalk's physical characteristics were changed to mark it as private property—specifically, the Venetian "mark[ed] its property lines and erected signs stating that the pedestrian walkway was private property." *Id.* at 940. And, once again, the public had a right-of-way across the private sidewalk. *See id.* at 942 (private sidewalk "is to provide unobstructed pedestrian access"). Finally, the legal question at issue was the same as in the two cases above: whether a private sidewalk is a public forum. *Id.* at 943.

The Ninth Circuit agreed that the private sidewalk was a public forum. Once again, the Ninth Circuit focused on what it considered to be an absence of sufficient physical changes, *see id.* at 945 ("there are no barriers or other physical boundaries"), as well as the sidewalk's continued use as a public throughway, *see id.* at 944 (sidewalk "still performs the same role as a thoroughfare for pedestrian traffic"). The court relied on "the sidewalk's history as a public forum," *id.* at 944, rather than the fact that "title to the property was held by the Venetian," *id.* at 943, and held that the sidewalk would cease to be considered public only if its "character or

its use" was "fundamentally altered," which, the court found "has not happened here," *id.* at 944.

Judge Brunetti dissented. For him, the legal question is not whether a public forum has been closed, but "whether a private party's actions are fairly attributable to the State" because "the private actor has assumed a traditionally public function" and thereby become a state actor. *Id.* at 952 (internal quotation marks and citation omitted). Distinguishing *Marsh v. Alabama*, 326 U.S. 501 (1946), as a case where a "company town performed *all* municipal functions and therefore was found to be a state actor," *id.* (emphasis added), Judge Brunetti concluded that "[t]he mere fact that the Venetian's sidewalk is open to the public generally and therefore performs the same function as a public sidewalk is not sufficient without more to subject the property to constitutional standards." *Id.* at 953.

4. *Mirage.* The Nevada Supreme Court, in contrast, has *rejected* claims that a private sidewalk is a public forum. In *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001), the sidewalk at issue is privately-owned. *See id.* at 245. And as in the previously-discussed cases, the sidewalk's physical characteristics were changed to mark it as private property—specifically, "[s]igns are posted at various points along the sidewalks indicating that they are the private property of the Mirage." *Id.* And, once again, the public had a right-of-way across the private sidewalk. *See id.* Finally, the legal question, once again, is whether a private sidewalk is a public forum. *See id.* at 248.

But the Nevada Supreme Court held that the private sidewalk was *not* a public forum: "Privately-owned property does not lose its private nature because the public traverses upon it." *Id.* at 248. Like Judge Brunetti's dissent, the Court examined whether the Mirage has "functionally assumed the role of the government" warranting "the application of the state action" doctrine. *Id.* at 247. And like Judge Brunetti,

the Court distinguished *Marsh v. Alabama* and held that the Mirage and its private sidewalk were not subject to constitutional constraints. *Id.* at 248.[2]

One Justice dissented, opining that "the very location and function of the sidewalks" makes it "impossible not to conclude that they serve as traditional public sidewalks," and thus "public forums." *Id.* at 252 (Rose, J., dissenting). "[W]hether publicly or privately owned" the dissenting Justice believed they are public forums, for "[t]he sidewalks at issue . . . function in every other respect as traditional public sidewalks," and a public sidewalk is always a public forum. *Id.* at 252-54.

B. Lower Courts Use Conflicting Approaches to Analyze Whether a Private Sidewalk is a Public Forum

1. The different outcomes described above might be tolerable if they arose from uniform application of a fact-intensive legal standard to varying circumstances. But that is not the case. As already shown, the facts of these cases are strikingly similar. More important, the courts are divided not only as to outcome, but also as to the proper legal analysis. And the choice of analytic framework is critical, for one approach presumes, absent exceptional circumstances, that free speech restrictions *do apply*, and the other presumes that First Amendment restrictions *do not* apply. In short, the choice of analysis may well be outcome determinative.

If the question is framed in "public forum" terms, as some courts do, then the starting premise is that free speech

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[2] Two Justices concurred on the ground that the speech in question was commercial. *Id.* at 252 (Maupin, C.J., concurring). As Petitioner explains (Pet. 15 n.5), the plurality decision reflects the holding of the Nevada Supreme Court because "the reasoning and holding of the plurality view" is considered "binding unless and until overruled by three or more Justices." *Craigo v. Circus-Circus Enters., Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990).

restrictions apply. For these courts, a public sidewalk is the "archetype" of a traditional public forum, *see Frisby v. Schultz*, 487 U.S. 474, 480 (1988), and presumptively subject to First Amendment constraints. While "the government always retains the authority to close a public forum, *by selling the property*, changing its physical character, or changing its principal use," to do so the State "must alter the objective physical character or uses of the property . . . to change the property's forum status." *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 699-700 (1992) ("*ISKCON*") (Kennedy, J., concurring in the judgment) (emphasis added). Because "it is critical that we preserve these areas for protected speech," *id.* at 698, "when property is a protected public forum the State may not by fiat assert" that a public forum is closed, but must "bear the attendant costs" of proving a "change [of] the property's forum status," *id.* at 700. As a result, private sidewalks that still look like and are used as public throughways are governed by the First Amendment.

Courts approaching the issue as one of "state action," on the other hand, begin with the opposite presumption. Those courts understand that starting with the "public forum" approach skips the critical first step, for public forum analysis does not even apply at all until it is determined that First Amendment restrictions are even implicated—and that does not occur unless there is state action. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government," not abridgment by private parties. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). Because the First Amendment does not impose restrictions on a private party, "a private owner of property . . . has power to preserve the property under its control for the use to which it is lawfully dedicated," *Green v. Spock*, 424 U.S. 828, 836 (1976), including restrictions on speech. That presumption may be overcome when a private party so assumes traditional governmental functions that it

becomes a "state actor." But that very narrow exception does not extend to private ownership of streets or sidewalks that do not amount to a "company town" as in *Marsh v. Alabama*. As a result, speech restrictions on private streets and sidewalks do not raise any First Amendment problem at all.

2. The cases discussed above disagree as to which analysis to apply—and indeed, sometimes appear not to understand the difference between the two. Both the court below and the Ninth Circuit, for instance, apply "public forum" doctrine, and frame the inquiry as whether the government has taken sufficient steps to close a formerly public forum. *First Unitarian*, 308 F.3d at 1130 (Pet. App. 25a-27a); *Venetian*, 257 F.3d at 943-45. Both courts quote and rely on Justice Kennedy's concurring opinion in *ISKCON*, 505 U.S. at 700, for the proposition that the government may change a property's public forum status only by altering "the objective physical character or uses of the property." *See First Unitarian*, 308 F.3d at 1131 (Pet. App. 27a); *Venetian*, 257 F.3d at 944. And, not surprisingly, both courts hold that the sidewalks in question, still open to the public as throughways, are not so changed that they have lost their public-forum character. *See First Unitarian*, 308 F.3d at 1131 (Pet. App. 27a); *Venetian*, 257 F.3d at 944-45.

Though the issue is never joined expressly, Judge Brunetti takes a very different approach in his Ninth Circuit dissent, treating the issue as one of "state action." That is enough to reverse the presumptions, so that the First Amendment is not implicated unless operation of a sidewalk is enough to transform a private party into a state actor under *Marsh v. Alabama*'s "public function" rule. *Venetian*, 257 F.3d at 952-53. Given the narrowness of the *Marsh* exception, it is again not surprising that Judge Brunetti should reach a conclusion different than the majority's, and argue against subjecting the private sidewalk to constitutional constraints. *Id.*

Similarly, both the Nevada Supreme Court and Virginia Court of Appeals appear to engage in a "state action" analysis of the private sidewalks in question. For the Nevada Court, for example, the relevant question is whether the Mirage has "functionally assumed the role of the government" in owning and maintaining a sidewalk. 23 P.3d at 247. Under *Marsh*, as narrowed by subsequent decisions, the answer is no. *Id.* at 247-48; *see also id.* at 248 (private sidewalk is not public forum in part because "no state action has occurred"). Though the Virginia Court of Appeals comes to a different conclusion, it, too, analyzes the issue in terms of state action, finding that the City cannot "privatize" its streets and sidewalks simply by conveying them to a different governmental entity. *See* 548 S.E.2d at 254, 255 (citing *Marsh*).

In short, the courts are divided not only with respect to outcome, but also with respect to the appropriate analysis. And the choice of analysis, though not dispositive in every case, tilts a court's starting presumptions in a way that does much to determine the result. Unless this Court steps in to clarify the standards that govern, this area will continue to be marked by conflicting and seemingly arbitrary decisions. Moreover, if this Court grants certiorari to decide whether a private sidewalk is a public forum, it should—and necessarily must—decide which analysis should be employed to answer that question. The analytical choice is inseparably intertwined with—and logically antecedent to—the legal conclusion that the Court would reach.

C. The Petition Should be Held Pending the Decision in *Virginia v. Hicks*

One of the questions presented by *Hicks* asks the Court to decide whether (and how) the State may sell or privatize streets and sidewalks and thereby close what was previously considered to be a public forum. Indeed, as characterized by petitioner, *Hicks* raises precisely the same issue as is raised

in this petition: "essentially a question of whether sidewalks [that have been deeded] are constitutionally different from common ordinary sidewalks along a public street." Reply Br. of Pet. at 2 (No. 02-371).

The Court should therefore hold this petition pending the decision in *Hicks*. If *Hicks* does not resolve the question presented in this case, then this Court should grant the petition to consider the important question of whether a private sidewalk is a public forum. *Hicks* could be decided, that is, on overbreadth grounds, an alternative question presented in the petition. Even if the Court reaches the public forum question, the Court might resolve it on the narrow grounds that a sidewalk does not become "private" merely because the government has deeded it to *itself* in its landlord capacity. In either case, the Court should grant this petition to resolve the First Amendment status of sidewalks that are *truly privately-owned*—an issue on which there would remain conflicting decisions and substantial confusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, at a minimum, held pending the outcome of *Virginia v. Hicks*, No. 02-371.

Respectfully submitted,

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(7)

In The
Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The National Council of the Churches of Christ in the U.S.A.; The General Council on Finance and Administration of the United Methodist Church; The Baptist Joint Committee on Public Affairs; The Lutheran Church-Missouri Synod; The General Conference of Seventh-Day Adventists; The First Church of Christ, Scientist; The Community of Christ; The Navigators; The Association of Christian Schools International; The Colorado Catholic Conference; The Bishop and Diocese of Colorado; The Islamic Society of Colorado Springs; The Mid-America Union Conference of Seventh-Day Adventists

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
I. THE PETITION PRESENTS ISSUES OF UNUSUAL IMPORTANCE TO RELIGIOUS ORGANIZATIONS	3
A. Church Property Communicates the Church's Message	7
B. Freedom of Speech Prohibits Altering or Distorting the Church's Message	9
C. The Panel Improperly Dismissed These Important Concerns	11
II. THIS CASE PRESENTS COMPELLING ISSUES REGARDING CLOSING A PUBLIC FORUM	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) 15

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 10

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 12

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) 12

First Covenant Church v. Seattle, 840 P.2d 174 (Wash. 1992) 7

First Unitarian Church v. Salt Lake City Corp., 146 F.Supp.2d 1155 (D. Utah 2001) 8, 11, 14

First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002) 11, 12, 14, 15, 16

Greer v. Spock, 424 U.S. 828 (1976) 12

Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999) 11

Hotel Employees & Rest. Employees Union v. City of New York Dep't of Parks & Recreation, 311 F.3d 534 (2d Cir. 2002) 14

Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557 (1995) 9, 10

International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) 13

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 11, 12

TABLE OF AUTHORITIES – Continued

Page

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) 12

Sistrunk v. City of Strongville, 99 F.3d 194 (6th Cir. 1996) 10

Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) 7

Spence v. Washington, 418 U.S. 405 (1974) 8

Texas v. Johnson, 491 U.S. 397 (1989) 8

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 15

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1942) 8

OTHER AUTHORITIES

Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991) 7

Coleman Cornelius, *Faithful Flock to Buddhist Shrine*, DENVER POST, August 17, 2001 6

Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984) 15

Lou Gonzales, *Los Peregrinos: Journeys to El Santuario de Chimayo give comfort to mother, skeptical daughter*, THE GAZETTE, April 12, 1998, at A13 5

TABLE OF AUTHORITIES – Continued

Page

Thomas Pak, *Note, Free Exercise, Free Expression, and Landmarks Preservation*, 91 COLUM. L. REV. 1813 (1991) 7

Genesis 2 (the Garden of Eden) 8

Isaiah 58:11 8

John 19:41 8

I Kings 22:13-28 3

Matthew 26:30-56 8

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae represent a diverse group of religious communities of various theological and ecclesiastical traditions. We are Protestants, Catholics, Muslims, and others. We support the petition for writ of certiorari in order to protect our property rights, freedom of speech, and religious liberty when we gather together within our congregations and with others to worship, evangelize, teach, meditate, and celebrate on our own properties.

We own parcels of land, large and small, in every hamlet and metropolis across the country. We often find ourselves as lightning rods for protest, even as we seek to dedicate our properties, like we dedicate ourselves, to communicating our sacred messages to a troubled world. Thus, we have a deep and abiding interest to ensure that the property agreements we negotiate and execute with local, state, and federal governments are enforceable and that the law governing those agreements is predictable.

The Tenth Circuit panel's decision below, however, unsettles these areas of the law so dramatically that we are compelled to lift our voices to support the petition and ask this Court to hear this case. We object to how the panel virtually ignored the compelling interests of The Church of Jesus Christ of Latter-day Saints ("LDS Church" or "Church"). Rather, its narrow focus on Salt Lake City ("City") distorts its analysis, resulting in unacceptable uncertainty in the overlapping areas of property,

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[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of Court confirming that all parties have consented to the submission of this brief.

speech, and religious jurisprudence. To protect our church[2] grounds, gardens, camps, cemeteries, and other private property from unintended judicial conversions into "protest zones," we respectfully request this Court grant the petition for a writ of certiorari to the Tenth Circuit.

Individual statements of interest may be found in the addendum to this brief.

REASONS FOR GRANTING THE PETITION

The panel's decision below deeply troubles us. It unsettles the law in ways that will dramatically affect our current property holdings and our future purchases. In sum, the opinion unnecessarily forces us into an "all or nothing" position when negotiating to buy public property: Either we buy *all* the sticks in the government's property bundle, or we buy nothing. Any other course of action – given the panel's precedent – exposes us to the virtual certainty of litigation over whether the remaining "sticks" support First Amendment protest zones and the substantial risk that a court will re-write our agreement with government to allow for such zones.

More broadly, this case raises important questions at the intersection of the law governing property, religion, and free speech. The opinion below directly implicates a church's ability to purchase public property and then use

[2] The words "church" and "churches" are used inclusively to denote religious institutions of any type – be they churches, synagogues, mosques, ashrams, or other ministries.

that property to convey its sacred messages. Churches are not shopping malls; thus, it is no answer to dismiss these important questions – as the panel does – by implying that church properties are mute like most commercial properties.

Insensitivity to context is the root cause of the panel decision's numerous infirmities. The panel appears oblivious to the nature of the property transaction between the Church and the City, the nature of the property's new owner (the Church), and the nature of the property itself. Rather than taking in all the relevant considerations, the panel narrowed its focus to only the City and the easement restrictions. This myopic view results in a serious distortion of heretofore settled and important legal principles.

I. THE PETITION PRESENTS ISSUES OF UNUSUAL IMPORTANCE TO RELIGIOUS ORGANIZATIONS.

Churches speak to the world in a variety of ways. They preach. They publish. They sing. However, they also speak through architecture and outdoor spaces. Thus, they carefully construct and maintain religious property – mindful that those who visit these spaces might learn the faith and encounter God. Prophets, priests, and preachers speak truth to power. They and their religious institutions often stand against the culture and thereby attract critics eager to protest against them.[3] Churches own and operate innumerable properties for religious purposes, including cathedrals, chapels, synagogues, mosques, gardens, temples, retreat centers, monasteries, camps, and shrines.

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[3] *See, e.g., I Kings* 22:13-28.

They own structures for worship and ritual, sites of sanctuary and pilgrimage, and havens for prayer and contemplation. While some properties limit access exclusively to religious adherents, many – like the LDS Church Plaza here – are open to the public, drawing tourists, visitors, and pilgrims for both religious and secular reasons. Churches purchase such properties from a variety of sellers, including cities, counties, states, and the federal government. For the good of the public, churches often grant assorted easements across their land, including utility, transportation, "access and passage," railroad, emergency vehicle, aviation, historic preservation, and temporary construction.

Like the LDS Church in this case, *amici* and other churches have similar sorts of religious campuses and parks, some of which are open to the public. For example, consider *amicus* The Navigators, a Christian evangelical organization whose mission is "to know Christ and to make Him known" to the world. *See* The Navigators website at <http://home.navigators.org/us/>. In 1957, The Navigators bought Glen Eyrie, a breathtaking property spanning 750 acres and nestled in the foothills of Colorado Springs near the spectacular red rocks of the Garden of the Gods. At the center of Glen Eyrie is a 67-room castle – the former home of General William Jackson Palmer, founder of Colorado Springs. Due to its history and beauty, Glen Eyrie attracts tourists and Colorado Springs residents and also serves as The Navigators' spiritual home and international conference and training center. A dirt bicycle and jogging trail crosses the eastern edge of the Glen Eyrie property, because The Navigators granted to the City of Colorado Springs a limited easement for that purpose. The panel's decision below appears to require

that demonstrators of any type may now gather on that trail to march, speak, or protest. The panel's decision puts an unwelcome, difficult question to The Navigators: Should they purchase the easement from the City of Colorado Springs – an unexpected expense and politically unpopular decision – or should they permit hostile protests on the property of their international headquarters? Furthermore, the panel's decision will make the Colorado Springs community worse off because it is likely that, had the panel's opinion stated the law when the easement was negotiated, The Navigators would have refused to grant it to the City.

Similarly, in the Sangre de Cristo Mountains of New Mexico, north of Santa Fe, El Santuario de Chimayo is a holy place and pilgrimage site for Roman Catholics. *See* El Santuario de Chimayo: The Lourdes of America at <www.roadsideamerica.com/attract/NMCHIshrine.html>); *see also* Lou Gonzales, *Los Peregrinos: Journeys to El Santuario de Chimayo give comfort to mother, skeptical daughter*, THE GAZETTE, April 12, 1998, at A13. Each year, over 300,000 people – some pilgrims, some tourists – visit the chapel at Chimayo to see the miraculous crucifix and be healed by the sacred sand. Believers and non-believers have come to El Santuario since 1816, surely enough time to assert some sort of public easement across the property. The logic of the panel's opinion extends to make El Santuario a public forum on which demonstrations against the Catholic Church and its teachings are required under the First Amendment.

As a final example, consider the Great Stupa of Dharmakaya, the largest and most ornate Buddhist temple in the Western world, recently opened at the Rocky Mountain Shambhala Center about ten miles northwest of

Fort Collins, Colorado. *See* Coleman Cornelius, *Faithful Flock to Buddhist Shrine*, DENVER POST, August 17, 2001. The 108-foot-high temple stands on 600 acres, cost $2.7 million in construction materials (about 500 volunteers donated their labor), took fourteen years to build, and is decorated with Buddhist prayer flags, icons, and symbols. *Id.* "The temple is the centerpiece of a $40 million expansion at the Buddhist center . . . [and is expected] to become a Buddhist pilgrimage site and a Colorado tourist attraction, much as other well-known churches and temples attract the faithful and the curious." *Id.* In the Main Hall of the temple sits an eighteen-foot-tall Buddha finished in gold leaf and, above it, the ceiling has been painted with an intricate pattern of Buddhist icons and symbols. *Id.* Beginning August 25, 2001, the Great Stupa of Dharmakaya was opened for public tours between 11 a.m. and 2 p.m. *Id.* The panel's decision raises the specter that, were the Shambhala Center to grant a road or pathway easement to the county, those opposing Buddhism may sue to protest at the Center by claiming that the First Amendment requires a "protest zone" on that private property.

These examples could be multiplied throughout the states in the Tenth Circuit and the rest of the country, because churches hold myriad properties, many of them with different types of public access or easements. Given that churches are lightning rods for criticism, the panel's decision to undermine the ability of the LDS Church to control its own message deeply troubles these *amici*.

A. Church Property Communicates the Church's Message.

No matter their size or ancillary functions, properties operated primarily for religious purposes are dedicated to advancing the faith. They are "freighted with religious meaning," *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571, 573 (Mass. 1990), and their physical aspects model the "invisible or 'spiritual' church," Thomas Pak, *Note, Free Exercise, Free Expression, and Landmarks Preservation*, 91 COLUM. L. REV. 1813, 1841 (1991). Religious properties "express, among other things, the religious community's purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of the culture." Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 450 (1991). By their design and architectural elements, the properties "shape the individual and communal religious experience," either fostering or constraining the spiritual development of adherents. *Id.* at 405.

As the Washington Supreme Court held in striking down an historic landmark statute that controlled the design elements of church buildings, a "church building itself is an expression of [religious] belief and message" – an "architectural proclamation"; indeed, "conveying religious beliefs is part of the building's functions." *First Covenant Church v. Seattle*, 840 P.2d 174, 182 (Wash. 1992) (quotations omitted). When discussing the expressive significance of saluting the flag, this Court explained that "[s]ymbolism is [an] effective way of communicating ideas. . . . [Just as a state speaks through flags, crowns, uniforms and black robes,] the church speaks through the Cross, the Crucifix,

the altar and shrine, and clerical raiment." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1942); *see also Spence v. Washington*, 418 U.S. 405, 409 (1974) (instructing that nonverbal expression is protected "speech" when "sufficiently imbued with elements of communication," including a particularized message and a likelihood that the message will be understood by those who view it); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (same).

In this case, the District Court found that the Plaza is a "landscaped ecclesiastical park" with "identifying signs [and] . . . religious statuary and symbolism throughout . . . , all of which alert the pedestrian to the religious theme of the area." *First Unitarian Church v. Salt Lake City Corp.*, 146 F.Supp.2d 1155, 1167 (D. Utah 2001). It further found "the Church Plaza is a religious enclave [whose] functions include spreading the LDS Church's religious message, celebrating religious themes, [and] celebrating the 'majesty and beauty' of the Temple." *Id.* at 1168. From the Plaza's gardens – evoking the numerous biblical references to gardens, *see, e.g., Genesis* 2 (the Garden of Eden); *Isaiah* 58:11 (comparing the people of Israel to a "well-watered garden"); *Matthew* 26:30-56 (Garden of Gethsemane); *John* 19:41 (Jesus' tomb in a garden) – to the statue of Brigham Young[4]

[4] The Brigham Young Monument is an eight-foot-tall statue of the LDS Church's second prophet standing atop a pedestal with his hand extended, declaring "This is the place!" – a reference to President Young's pronouncement that the Salt Lake Valley was the place of refuge for the Mormons which he had seen in a prophetic vision. Petitioner's 10th Cir. App. at 680, ¶ 163; at 782-83, ¶ 20 (Kerry Nielsen's affidavit).

and the Book of Mormon Monument[5] near the southern entrance, it is undeniable that the Plaza clearly tells the story of The Church of Jesus Christ of Latter-day Saints. In the same way, the massive, golden Buddha at the Great Stupa of Dharmakaya and the dusty crucifix of El Santuario de Chimayo are sacred symbols for their respective adherents. Such signs and symbols are multivalent. They invest the Stupa, El Santuario, and the LDS Plaza with layers of religious significance which no quantity of words could equal.

B. Freedom of Speech Prohibits Altering or Distorting the Church's Message.

A speaker's "autonomy to choose the content of his own message" is a "fundamental rule of protection under the First Amendment." *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995) (holding that a state court's application of public accommodation law to require Irish Catholic parade organizers to alter the expressive content of their parade violated the First Amendment). This Court in *Hurley* continued,

> Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say. . . . [The state] may not compel

[5] Near the southeast entrance to the Plaza hangs a large rectangular plaque celebrating "The Book of Mormon: Another Testament of Jesus Christ." The top border of the plaque reads, "Unto All Nations" – a reference to the universality of the Book of Mormon's message. The two side borders contain the name of the Book of Mormon in numerous other languages. Petitioner's 10th Cir. App. at 681, ¶ 165; at 783, ¶ 22 (Kerry Nielsen's affidavit).

> affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.

Id. (citations and quotation marks omitted; emphasis in original). This Court has recognized that the "overall message" attributed to a group may be shaped by numerous voices perceived to be associated with the group – "each unit's expression is received by spectators as part of the whole." *Id.* at 577.

If a church is forced to allow the full range of First Amendment expression on all or part of its religious property, visitors will, at best, be confused as to the content of the church's message. At worst, they will attribute messages to the church that the church itself rejects. Regardless, the panel's decision violates the First Amendment by compelling the LDS Church to open its property to divergent voices and thereby altering or distorting the Church's own expression in violation of the freedom of speech. *Id.*; *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (holding that the presence of a gay scout leader would interfere with the Boy Scout's choice not to express a point of view contrary to its beliefs); *Sistrunk v. City of Strongville*, 99 F.3d 194, 199 (6th Cir. 1996) (explaining that a sponsor of a Bush/Quayle political rally could exclude a Clinton supporter because inclusion "would alter the message the organizers sent to the media and other observers").

Moreover, as the District Court correctly noted in the context of the reasonableness of the Plaza's restrictions, "it is undisputed that the public still has unrestricted access to the extensive public sidewalks that border the Church

Plaza on two sides as well as bordering the adjacent Temple Square and Church Administration Block." *First Unitarian Church*, 146 F.Supp.2d at 1173 (citing *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1291 (10th Cir. 1999) (stating that its conclusions on the reasonableness of the restrictions at issue were "bolstered by the fact that ample alternative channels for communications remain available")). These are compelling issues of law which this Court should consider.

C. The Panel Improperly Dismissed These Important Concerns.

The panel dismisses these compelling concerns in a single sentence. It first acknowledges that "[t]he City and Church assert any expressive conduct by the public would interfere with . . . the Church's own ability to communicate." *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1129 (10th Cir. 2002). But then it dismisses the issue by comparing churches to shopping centers: "Protecting the Church's expression from competition is not a legitimate purpose of the easement or its restrictions, so we do not consider its compatibility with speech." *Id.* (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-87 (1980)).

This treatment of the issue concerns *amici* for three reasons. First, the pages cited from *PruneYard Shopping Ctr.* are off-point. In that case, the shopping mall argued that "a private property owner has a First Amendment right not to be forced by the State *to use his property as a forum for the speech of others*." *PruneYard Shopping Ctr.*, 447 U.S. at 85 (emphasis added). *Amici* argue that permitting protesters on church property will distort the messages the churches

speak *through their property*. Whether there is a First Amendment right to be protected from the use of private property as a forum for the speech of others is a different question altogether.

Second, architecturally, churches are not shopping centers. The mall in *PruneYard Shopping Ctr.* did not claim, as *amici* do here, that the property itself speaks. The LDS Church carefully designed its Plaza to communicate the Church's religious history and belief. Shopping malls are carefully designed to facilitate consumer spending.

Third, this Court has repeatedly recognized that religious organizations and religious speech occupy a special place under American law. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987) (the Religion Clauses permit the State to accommodate religion with special provisions in statutes); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (religious speech receives full protection under the Free Speech Clause: "[I]n Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.") (emphasis in original); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) (acknowledging that in the "rough hierarchy" of constitutional protection for speech, political, like religious, speech is afforded the most protection, while commercial speech is in the "second tier"). Interestingly, the panel recognizes that the Anglo-American legal tradition treats the military differently, *see First Unitarian Church*, 308 F.3d at 1127 (citing *Greer v. Spock*, 424 U.S. 828 (1976)), even as it

stubbornly maintains a blind-spot for religious organizations.

This Court should grant the petition to reaffirm the appropriate place of religious organizations in our constitutional system.

II. THIS CASE PRESENTS COMPELLING ISSUES REGARDING CLOSING A PUBLIC FORUM.

The petition identifies the conflicts between both (1) the Tenth Circuit and the Second Circuit and (2) the Tenth Circuit and the Nevada Supreme Court over the proper analysis for determining whether, when the government retains certain "sticks" from the bundle of interests in a fee simple absolute, public fora are created. Moreover, this Court has never specifically addressed how government, in conjunction with a private buyer, can constitutionally close a public forum. *Amici* request this Court take this case because these issues are of great and recurring importance as *amici* negotiate and purchase public land for their religious uses.

Justice Kennedy has identified three ways in which a public forum may be closed:

> [T]he government always retains authority to close a public forum, by [1] selling the property, [2] changing its physical character, or [3] changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.

International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring).

The record below indicates that the Church and City completed all three of these items. It is undisputed that the City sold the property to the Church for over $8 million, representing full market value. *See First Unitarian Church*, 146 F.Supp.2d at 1159. The District Court below described the many ways in which the Church transformed the physical character of the property to make it an ecclesiastical park. *Id.* at 1167-68. Likewise, the District Court explained in detail how the principal use was fundamentally changed. *Id.* at 1168-69. The panel itself devotes a paragraph to the transformation of the Plaza:

> At its own expense, the Church reconstructed the former street and sidewalks, making the area an attractive plaza that fits seamlessly into the Church's downtown campus. There are paved walking areas interrupted by planters, benches, and waterfalls, a large reflecting pool, and changes in grade. The Church uses the plaza for religiously-oriented exhibits, dissemination of information, and special events, as well as for the entrance to the Temple Square.

First Unitarian Church, 308 F.3d at 1119. Despite this strong factual record, the panel overturned the District Court's finding that this transformation effectively closed the public forum. *Id.* at 1131 (concluding that "the easement is a public forum").

Amici are concerned about this conclusion for four reasons. First, the panel focuses exclusively on the limited easement, expressly disclaiming the need to examine the Plaza and the easement together, in their natural context. *Contrast Hotel Employees & Rest. Employees Union v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534,

551-52 (2d Cir. 2002) (analyzing the relevant parcel in context, and collecting cases involving the same issue). The panel finds error in that "the district court considered the religious purpose of the plaza when it should have considered the purpose of the easement." *Id.* at 1130. *See also id.* at 1128 & n.10 (further evidence of the panel's unnatural focus on the easement, apart from the Plaza). This narrow focus is disturbing because (1) factually, the easement cannot be separated from the surrounding Plaza (as a walk through the Plaza and the photographs of it show), and (2) legally, public forum analysis has always been recognized as being sensitive to the surrounding context. *See, e.g., Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 676-77 (1998) (analyzing the context of a television broadcast to conclude that it constitutes a nonpublic forum). *See generally,* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication,* 70 VA. L. REV. 1219, 1234 (1984). Thus, it is clear that the District Court acted correctly in analyzing the full context of the pedestrian easements as part of the Plaza.

Second, the panel also ignored the fact that there are "ample alternative channels of communication" just yards from the Plaza. Protesters who wish to speak against the LDS Church may do so on the public sidewalks and streets which surround the Plaza and Temple Square. *See* Petition at 106a (map of Temple Square and surrounding parts of Salt Lake City). By overlooking this element, the panel has undermined bedrock free speech doctrine. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

Third, the panel's cramped view of how a public forum may be closed leaves this important area of the law unsettled. The panel believes that "the City wants to have its

cake and eat it too" because it has not "b[orne] the attendant costs" of eliminating the public forum. *First Unitarian Church*, 308 F.3d at 1131 (italics omitted). The panel insists on an "all or nothing" approach: "If it wants an easement, the City must permit speech on the easement. Otherwise, it must relinquish the easement so the parcel becomes entirely private." *Id.* at 1132. We ask the Court to hear this case to clarify that this rigid, black-or-white methodology is not the law. Without such clarification, the panel's opinion will significantly chill church purchases of public land in the Tenth Circuit and elsewhere. Churches, predisposed to be good neighbors, will be forced to take an inflexible negotiating position with government: Either sell us a fee simple absolute or we have no deal; we cannot permit government to retain any sort of property interest in the land. The panel's opinion is clearly not in the best interest of churches, government, or the community-at-large.

Fourth, while acknowledging that "[w]hether or not a particular government easement warrants application of forum principles" depends on context, *First Unitarian Church*, 308 F.3d at 123 n.5 (citing *Forbes*, 523 U.S. at 672-77), the panel wholly fails to analyze this threshold issue. As a result, the implicit holding of the opinion is that a pedestrian easement, standing alone, regardless of context, qualifies as a public forum. The LDS Church's substantial efforts to negotiate with the City in good faith to avoid this precise result are passed over by the panel, making vulnerable the numerous easements of various types *amici* have negotiated with public entities over the years.

CONCLUSION

For the foregoing reasons and those stated in the petition, *amici* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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April 14, 2003

APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Council of the Churches of Christ in the U.S.A. ("NCC") is the principal ecumenical organization in the United States through which thirty six Protestant, Orthodox, and Anglican member communions (denominations), with a combined membership of more than fifty million Christians in nearly 140,000 congregations nationwide, join in a common witness through ministries of faith, justice, education, and public witness. The Council has regularly provided leadership in matters of religious liberty and participated as *amicus curiae* in litigation in courts throughout the United States. The Council supports the right of churches to control conduct and expression on their own sacred properties and spaces. Many of the Council's constituent churches own property that could well be transformed into public forums under the Tenth Circuit's analysis.

The General Council on Finance and Administration of The United Methodist Church ("GCFA") is the finance and administrative agency of the United Methodist denomination. The denomination is a religious movement and connectional network of 8,500,000 members and approximately 37,000 local churches in the United States, and approximately 10,300,000 members worldwide. The denomination is embedded not only in the tradition and teachings of religious tolerance but also seeks to provide worship, mission and redemption for the world. GCFA has an interest in this litigation because it is specifically charged with safeguarding and protecting the legal rights and interests of the denomination, according to *The Book of Discipline*, the denomination's legislative compilation of polity and ecclesastical law.

The Baptist Joint Committee on Public Affairs is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention Inc., Religious Liberty Council, and Seventh Day Baptist General Conference.

The Lutheran Church-Missouri Synod (the "Synod") is the second largest Lutheran body in the United States, with approximately 2.5 million individual members and 6,100 congregations. The Synod's Commission on Theology and Church Relations ("the Commission") has carefully studied "the various aspects of the relationship between church and state, giving special attention to issues such as 'who speaks for the church,' 'when,' and 'on what basis.'" The Commission's study found that Christians must "pay close attention to [the] choice of message, messenger, and means." Allowing easements on church properties to be converted into "protest zones," fundamentally disturbs the church's choices of message, messenger, and means, infringing upon the church's religious liberty, free speech, and property rights. The Court's decision in

this case may directly affect at least one Synod agency, which has granted a public access and passage easement across its property.

The General Conference of Seventh-Day Adventists is the highest administrative level of the Seventh-Day Adventist Church and represents nearly 51,000 congregations with more than 12.3 million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,500 congregations in the United States with more than 900,000 members. The Seventh-Day Adventist Church strongly supports the twin concepts of free exercise of religion and the separation of church and state and actively promotes those ideals through its bi-monthly *Liberty* magazine. The Working Policy of the North American Division states "that religious liberty is best achieved, guaranteed and preserved when church and government respect each other's proper areas of activity and concern" and that "in matters where secular and religious interest overlap, government, in the best interests of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights." The Seventh-Day Adventist Church believes the legitimate rights of the Church of Jesus Christ of Latter-day Saints are at risk in this case.

The First Church of Christ, Scientist, in Boston, Massachusetts, is "The Mother Church" of one of the major indigenous American religious denominations – Christian Science. There are more then 2,000 local Christian Science congregations – "branches" of The Mother Church – existing in over sixty-five countries and in all fifty states

and the District of Columbia. The First Church of Christ, Scientist has a 14-acre headquarters campus in Boston, portions of which were once public streets and over which there are pedestrian easements. The First Church of Christ, Scientist has as part of its current Mission Statement a focus on "advancing and preserving religious rights for all."

The Community of Christ, formerly known as the Reorganized Church of Jesus Christ of Latter Day Saints (RLDS Church), is an International Christian Religious Society with headquarters in Independence, Missouri and membership in every state and over 40 nations. The mission of the Community of Christ is to proclaim Jesus Christ and promote communities of hope, love, peace and joy. The Community of Christ is committed to the pursuit of peace and justice.

The Community of Christ has an interest in this litigation because the case raises important questions concerning churches' First Amendment rights of speech and institutional autonomy, and Establishment Clause principles disfavoring excessive entanglements of church and state inhibiting religion.

The Navigators is a non-profit organization whose mission is to serve Christ and fellow members of the body of Christ by reaching, discipling, and equipping lifetime laborers to know Christ and to make him known. The worldwide Navigator missions include a staff of 3702 of 63 nationalities working among 157 peoples, using 152 languages in 104 countries. Navigator ministries include youth ministries, ethnic and cultural ministries, collegiate ministries and community ministries.

The Association of Christian Schools International is a nonprofit, non-denominational, religious association providing support services to more than 4,000 Christian preschools, elementary, secondary, and post-secondary schools in the United States and 1,000 additional schools in 102 nations. Approximately three-fourths of the schools are church-run; the remaining are lay-board owned and operated religious schools. The international office of the association is located in Colorado Springs.

The Colorado Catholic Conference is the state-level, public-policy agency operated jointly by the Archdiocese of Denver, the Diocese of Pueblo, and the Diocese of Colorado Springs. The Colorado Catholic Conference advocates and promotes the teachings and positions of the Catholic Bishops of Colorado in the area of public policy. It represents 197 parishes, 521,954 Catholics, and 16,671 students in 51 schools.

The Bishop and Diocese of Colorado represents approximately 40,000 Episcopalians who reside within the boundaries of Colorado. The Diocese of Colorado accedes to the Constitution and Canons of the Protestant Episcopal Church in the United States of America, otherwise known as The Episcopal Church, and its members are constituent members of the Worldwide Anglican Communion. The Diocese of Colorado is made up of 110 congregations in 77 communities across the state.

The Islamic Society of Colorado Springs ("ISCS") is an Islamic organization serving and representing the Muslim community of Colorado Springs. It provides a place of worship, conducts worship services, arranges religious education and collects and distributes charitable contributions. The Muslim community in Colorado Springs is

estimated to be over two hundred men, women and children. ISCS is a religious non-profit organization incorporated in Colorado and affiliated with the national organization of the Islamic Society of North America (ISNA).

The Mid-America Union Conference of Seventh-Day Adventists is the administrative body for six local church conferences covering the states of Colorado, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri and San Juan County in New Mexico, which includes 498 churches, 230 pastors and 56,000 members.

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IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY IN SUPPORT OF CERTIORARI	1
I. THE DECISION BELOW CONFLICTS WITH THE SECOND CIRCUIT ON HOW TO APPLY PUBLIC FORUM ANALYSIS TO PROPERTY SUBJECT TO PUBLIC ACCESS RIGHTS	2
II. THE DECISION BELOW CONFLICTS WITH A BINDING NEVADA SUPREME COURT DECISION AS TO WHETHER A PRIVATE WALKWAY CAN BE A PUBLIC FORUM	6
III. *HICKS* ILLUSTRATES THE NEED FOR FURTHER GUIDANCE ON WHEN A GOVERNMENT CAN CLOSE A PUBLIC FORUM	8
IV. AS THE AMICUS BRIEFS CONFIRM, THE DECISION BELOW HAS SWEEPING IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS AND FOR CHURCHES	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Coughlin v. *Tailhook Ass'n*, 112 F.3d 1052 (9th Cir. 1997) 8
Craigo v. *Circus-Circus Enters. Inc.*, 786 P.2d 22 (Nev. 1990) 7
Hotel Employees v. *New York*, 311 F.3d 534 (2d Cir. 2002) 1, 3, 4, 5, 6
Int'l Soc'y for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672 (1992) 9
S.O.C., Inc. v. *Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001) 1, 6
Venetian Casino Resort, L.L.C. v. *Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002) 7
Virginia v. *Hicks*, 123 S. Ct. 990 (2003) 1, 8, 10

RULE

Sup. Ct. R. 10(a) 7

OTHER AUTHORITIES

Heather May, *Planners Reject LDS Plaza Deal*, Salt Lake Trib. (Apr. 10, 2003) 2
Heather May, *ACLU Urges High Court to Reject Plaza Case*, Salt Lake Trib. (Apr. 12, 2003) 8

The brief of the private respondents (hereafter "respondents") in opposition to certiorari is striking primarily for what it does not dispute. Respondents do not deny that the decision below precludes a court, in determining whether a government property interest gives rise to a traditional public forum, from inquiring into the government's intent or the character of the surrounding property. That prohibition stands in stark contrast to the Second Circuit's decision in *Hotel Employees* v. *New York*, 311 F.3d 534 (2d Cir. 2002), which mandates precisely those inquiries. Nor do respondents dispute that the decision below squarely conflicts with the Nevada Supreme Court's decision in *S.O.C., Inc.* v. *Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001), on the issue of whether any walkway on *private* property can be deemed a public forum for First Amendment purposes. Nor do respondents dispute that, depending on how this Court resolves *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003), a decision there could warrant, at a minimum, vacating and remanding the decision below.

Instead, respondents attempt to minimize the practical significance of these issues and of the decision below. However, as shown below and in the briefs of respondent Salt Lake City and the various *amici curiae*,[1] that effort, and respondents' distortions of other key decisions, merely underscore the need for this Court's review.[2]

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[1] Briefs supporting the petition have been filed by respondent Salt Lake City, The National League of Cities et al. ("Municipalities Brief"), a number of states ("States Brief"), The National Council of Churches et al. ("Churches Brief") and The Venetian Casino ("Venetian Brief").

[2] Without disputing that the decision below is final, respondents also argue that review should be denied because the parties may disagree over the practical implications of the decision, and because a settlement has been proposed. Brief in Opposition ("BIO") at 4 n.1. But the City's brief in support of the petition makes clear that it agrees with petitioner on the issues that are germane to this Court's decision on *certiorari*. *See* City Br. at 1-3. Moreover, the fact that the parties are attempting to resolve this litigation through settlement is no reason to deny the petition. Indeed, the

I. THE DECISION BELOW CONFLICTS WITH THE SECOND CIRCUIT ON HOW TO APPLY PUBLIC FORUM ANALYSIS TO PROPERTY SUBJECT TO PUBLIC ACCESS RIGHTS.

As explained in the petition (at 8-14), the conflict between the decision below and the Second Circuit's decision in *Hotel Employees* lies in the different legal analyses applied to determine whether government-owned property will be treated as a traditional public forum. And, as respondents do not dispute, the decision below focused narrowly on the character and use of the property interest at issue. Pet. 11-14. Concluding that the public access easement here served the same purpose as the former public sidewalks, the Tenth Circuit held that the district court erred when it looked to the surrounding locale and the City's purposes in retaining the public access easement. See Pet. App. 21a-22a, 26a-28a.[3] By contrast, in *Hotel Employees* the Second Circuit engaged in precisely the type of broad analysis rejected by the Tenth Circuit. The Second Circuit based its decision on (a) the characteristics of the surrounding locale and how the government property fits into that locale, (b) the government's intent, and (c) the primary use and function of the property, as informed by the property's location and governmental intent. See Pet. 9-11. Respondents' attempts to

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City Planning Commission recently voted to reject the proposed settlement. Heather May, *Planners Reject LDS Plaza Deal*, Salt Lake Trib. at B-1 (Apr. 10, 2003). Although not binding on the City Council, which makes the final decision, the vote demonstrates substantial uncertainty as to whether the proposed settlement will ultimately be approved.

[3] Contrary to respondents' repeated suggestions, the Tenth Circuit did *not* hold that the City's property right was a classic "sidewalk easement" of the sort that developers grant to municipalities in lieu of deeding fee title. Here, the City retained an extremely limited use easement, *i.e.*, for public "access and passage only.". Pet. App. 87a. In contrast to a typical sidewalk easement, this limited easement has no metes and bounds, and the Church retains the right to direct pedestrian traffic across any area of the Plaza, provided passage is not unreasonably hindered. *Id.* at 89a.

avoid this conflict either distort or ignore key aspects of the Second Circuit's decision.

1. Respondents do not even address the major source of conflict between the Second and Tenth Circuits, which concerns the role of the property's location in the public forum analysis. Pet. 8-14. Respondents do not dispute that, under the Second Circuit's decision, a court undertaking a public forum analysis is *obligated* to consider all "relevant factors," including the property's "location" and (equivalently) "'how the locale is used.'" 311 F.3d at 552, 547. Nor do respondents dispute that, under the Tenth Circuit's analysis, by contrast, a court is *forbidden* to engage in that very inquiry because, according to that court, "it is the purpose of the . . . property that is a forum of some type, and *not* the purpose of . . . the surrounding property, that is at issue." Pet. App. 22a (emphasis added). By itself, the conflict on this important issue warrants this Court's review.

2. Respondents also provide precious little response to the second major area of conflict between the Second and Tenth Circuits. In a lone footnote (BIO at 11 n.3), respondents concede, as they must, that the Tenth Circuit expressly refused to consider the City's intent in creating the easement when determining whether it gives rise to a public forum. They also concede that in *Hotel Employees*, the Second Circuit, unlike the Tenth Circuit, expressly "weighed this factor" in its analysis of the public forum status of the Lincoln Center Plaza. *Id.*

Despite this obvious difference, respondents cryptically assert that there is no conflict "because Lincoln Center did not involve a traditional public forum." *Id.* (citing 311 F.3d at 551 n.12). If by this respondents mean that the Second Circuit's decision was based on something other than a traditional public forum analysis (*e.g.*, a designated or limited public forum analysis), respondents are incorrect. The Second Circuit's decision is clear: the court analyzed government intent *only* in its traditional public forum

analysis, see 311 F.3d at 552 ("we reject the . . . argument that the Plaza [is] a traditional public forum"), and "le[ft] for another day" the question whether the Lincoln Center Plaza constitutes a limited public forum, see *id.* at 553.

On the other hand, if respondents mean that the Second Circuit "weighed" government intent only because the plaza had not *historically* been labeled a traditional public forum, that merely reinforces the conclusion that the two decisions are in direct conflict. As the Second Circuit acknowledged, consideration of government intent would not be appropriate if the government were simply trying to "alter by fiat what is *indisputably* a traditional public forum" – such as a street or park that has "historically been open to all types of expression." *Id.* at 551 n.12 (emphasis added). However, where (as in that case) the proponent of a public forum argues by analogy – *i.e.*, that the public property is functionally similar to property that has traditionally been considered a public forum – consideration of the govern-ment's intent is essential. *Id.*

Under that principle, the City's intent clearly should have been considered in this case. It is undisputed that the government's easement did not even come into existence until the underlying property was sold to the Church. It is also undisputed that the public forum that existed on the property before the Church purchased it – a four-lane street with accompanying sidewalks – was closed, totally destroyed, and reconstructed into a religious plaza which "fits seamlessly" into the surrounding Church campus. Pet. App. 6a. Thus, as in *Hotel Employees*, no one could plausibly argue that the easement itself, running across a newly constructed religious plaza, had historically constituted a public forum. The Tenth Circuit's refusal to consider the City's intent is therefore in plain conflict with the very portions of the *Hotel Employees* decision cited by respondents.

3. Virtually all of respondents' analysis is directed to the third distinct area of conflict, namely, the use and major

function of the property. In that regard, respondents rely primarily on the Second Circuit's conclusion that the ability of pedestrians to use the Lincoln Center Plaza as a "'shortcut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex.'" BIO at 10 (quoting 311 F.3d at 550). But even on this point, the decision below conflicts starkly with the Second's Circuit's analysis of the *manner* in which a property's principal function and use is to be determined.

Under the Second Circuit's approach, as explained in the petition (at 9-11), the property's principal use must be evaluated in light of all relevant circumstances, taking into account the government's intent and the locale's attributes and uses. See 311 F.3d at 550-52; *supra* 2-3. By contrast, under the Tenth Circuit's approach, the property's principal use is to be determined in a virtual vacuum. See Pet. 11-14; *supra* 2-3. Thus, the Tenth Circuit analyzed the use and purpose of the easement without reference to the Plaza itself, the surrounding Church property, or the government's intent. See Pet. App. 22a, 28a. Its constricted analysis also prohibited it from weighing, as the Second Circuit did, whether the public would perceive the property as a traditional public forum or instead, as the Second Circuit put it, as more of a "'special type of enclave'" separate and apart from generally recognized areas of free speech. 311 F.3d at 550 (quoting *United States* v. *Grace*, 461 U.S. 171, 180 (1983)).

As a result of this narrow focus, the Tenth Circuit simply ignored the evidence showing that the principal purpose of the easement was not so much to *accommodate* the existing flow of pedestrian traffic from one side of Main Street to the other, but rather to *influence* the flow of traffic on a permanent basis by funneling tourists visiting Church sites from the Plaza into the downtown business district. See Summ. J. Mot. ¶ 44 (quoting deposition of City administrator regarding City's purpose for securing easement); Pet. App. 51a-52a (describing principal uses of Church Plaza). Thus,

the court's refusal to consider "the surrounding property" (*id.* at 22a) or "the government's intent" (*id.* at 15a) blinded the court to the truth about the principal use and purpose of both the Plaza and the easement. Had the court considered those factors in determining the easement's principal function and use, it could not avoid the conclusion that pedestrian passage from one side of the Plaza to another was, at best, an incidental function, as the Second Circuit concluded in *Hotel Employees*.

In short, *Hotel Employees* cannot be distinguished from the decision below based on the proposition that pedestrian access was an "incidental" use in the one case but the "principal" use in the other.[4]

II. THE DECISION BELOW CONFLICTS WITH A BINDING NEVADA SUPREME COURT DECISION AS TO WHETHER A PRIVATE WALKWAY CAN BE A PUBLIC FORUM.

As explained in the petition, this case also gives the Court

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[4] For the same reason, respondents are incorrect in relying upon the parenthetical in *Hotel Employees* summarizing the Tenth Circuit's conclusion that the purpose of the easement here was "'to "preserve and enhance . . . the pedestrian grid."'" BIO at 11 (quoting 331 F.3d at 552). Even if one assumes that this reference was intended to harmonize the two decisions – an assumption nowhere validated in the opinion – respondents' reliance on it begs the question of whether the legal analysis by which the Tenth Circuit reached that conclusion conflicts with the legal analysis used by the Second Circuit.

The conflict, moreover, cannot be avoided by recharacterizing the Tenth Circuit's conclusions as "findings." *See* BIO at 2, 3, 12, 16, 17. Appellate courts have no authority to make purely factual "findings."

Nor can the two decisions be harmonized by pointing to the Second Circuit's conclusion that the plaza forecourt in that case "'does not form part of the City's transportation grid in the way that traditional streets and sidewalks do.'" *Id.* at 10 (quoting 311 F.3d at 550). The Second Circuit never held, or even suggested, that this fact was dispositive. Instead, it was simply one aspect to consider in analyzing the property's function and purpose, which in turn was only one of three factors that the court considered in its traditional public forum analysis. *See* 311 F.3d at 552.

an opportunity to resolve a direct conflict with the Nevada Supreme Court's decision in *S.O.C., Inc.* v. *Mirage Casino Hotel*, 23 P.3d 243 (Nev. 2001), on the question of whether a private walkway can constitute a public forum. Respondents do not dispute that the decision below conflicts with the *Mirage* decision. Neither of their proposed reasons for ignoring that conflict passes muster.

First, contrary to respondents' suggestion, a conflict between a state supreme court and a federal court of appeals is clearly "the type" (BIO at 15) that warrants this Court's review. See Sup. Ct. R. 10(b). That conclusion is not undermined by the fact that the *Mirage* decision arose out of a preliminary injunction, or that Nevada lies in the Ninth Circuit, not the Tenth. See BIO at 15. Indeed, as one *amicus* has shown, the Ninth Circuit's decision in *Venetian Casino Resort, L.L.C.* v. *Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002), also squarely conflicts with the *Mirage* decision. Venetian Br. at 6-8.

Second, contrary to respondents' suggestion (BIO at 15), the fact that the principal opinion in *Mirage* did not command the votes of four justices also does not diminish the need for this Court's review. Respondents do not dispute that the *Mirage* decision has been relied upon by the local federal district court as binding precedent. See Pet. 15 n.5 (citing *Southwest Adver., Inc.* v. *County of Clark*, 202 F. Supp. 2d 1141, 1145 (D. Nev. 2002)). Moreover, as that decision illustrates, a plurality opinion of the Nevada Supreme Court must be followed until overturned under the principle announced in *Craigo* v. *Circus-Circus Enterprises Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990).

Here, respondents do not dispute that the principal opinion in *Mirage* announced the court's judgment, was joined by more members of the court than any other opinion, and was assumed by both the concurrence and the dissent to constitute a "majority" holding. See Pet. 15-16 & n.5. Thus, under the precedential principle articulated in *Craigo*, *Mirage*

constitutes binding Nevada law unless and until it is overturned.[5]

III. *HICKS* ILLUSTRATES THE NEED FOR FURTHER GUIDANCE ON WHEN A GOVERNMENT CAN CLOSE A PUBLIC FORUM.

This case also merits plenary review because it, like *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003), raises the important issue of how a government may close a public forum. Pet. 17-19. Respondents do not dispute this. See BIO at 16; see also ACLU *Hicks* Br. at 2-4; U.S. *Hicks* Br. at 11 & 29-30. Nor do they dispute that, if *Hicks* were to address the issue, that decision would likely provide guidance in this case. Given these undisputed points, this case should be held for *Hicks* if it is not granted immediately.

If the Court does not address the public forum closure issue in *Hicks*, however, this case provides an appropriate vehicle to do so. Indeed, respondents' own counsel, Mr. Lopez, recently stated that this case properly presents "'an opportunity to have a full and candid debate in front of the court about the circumstances under which what was indisputably a public forum can be closed.'" Heather May, *ACLU Urges High Court to Reject Plaza Case*, Salt Lake Trib. at B-3 (Apr. 12, 2003).

None of respondents' arguments can overcome this candid admission. First, contrary to respondents' suggestion, there is

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[5] Respondents point out that *Craigo* was a plurality opinion, and that one justice disagreed with the principle articulated there. BIO at 15 n.4. Even so, three Nevada supreme court justices and one local federal district judge are better positioned than respondents to assess the precedential effect of a Nevada plurality opinion. Those judges all agree that a decision like the *Mirage* plurality would be binding in the Nevada courts.

Coughlin v. *Tailhook Association*, 112 F.3d 1052, 1056 (9th Cir. 1997), *cited at* BIO 15 n.4, is not to the contrary. As the Ninth Circuit noted there, *Craigo*'s substantive ruling was no longer binding at the time of the *Coughlin* decision because *Craigo* had been *twice* overturned, first by a Nevada Supreme Court decision, and then by legislation.

no need to wait for "a case in which there has been an *unencumbered* transfer of title from public to private ownership." BIO at 16 (emphasis added). Nothing in Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc.* v. *Lee* suggests that the validity of a closure through a sale depends on whether the sale is encumbered or not. 505 U.S. 672, 699-700 (1992). Moreover, as explained by *amici*, sales of public property are routinely "encumbered" by easements or other conditions. Municipalities Br. at 1-2, 9-10; States Br. at 2-4.

Second, contrary to respondents' argument, the suitability of this case for addressing the closure of a public forum is not undermined by the unsupported assertion that the walkways on the Plaza here "continue to serve as a pedestrian throughway for downtown commuters, shoppers, and visitors." BIO at 18. Like the Tenth Circuit, respondents apparently believe that *any* property that retains "the essential form and function of municipal sidewalks," *id.* at 17, necessarily remains a public forum, even after a sale to a private entity. See *id.* But that dubious position contradicts the thrust of Justice Kennedy's concurrence in *Lee*; has never been adopted by a majority of this Court; and is flatly contrary to the Nevada Supreme Court's decision in *Mirage*.

IV. AS THE AMICUS BRIEFS CONFIRM, THE DECISION BELOW HAS SWEEPING IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS AND FOR CHURCHES.

Respondents also incorrectly argue that this case does not warrant the Court's attention because it is "virtually unique" among public forum cases (BIO at 1) and "involves Main Street and nothing more," *id.* at 19. This is belied by the Tenth Circuit's sweeping language, which expressly extends to all "downtown public spaces conducive to expressive activities." Pet. App. 28a. It is also belied by respondents' own sweeping contention that the decision "ensures that *municipalities* [and, presumably States] do not surrender the

public's First Amendment rights . . . for other public benefits such as urban renewal or, as here, revenue from the sale of public property." BIO at 19.

Respondents' attempt to minimize the Tenth Circuit's decision is further undermined by the supporting *amicus* briefs. As explained by the Municipalities and the States, the decision casts a long shadow on many other transactions throughout the Tenth Circuit and, indeed, the nation, in which governments sell public property to a private entity subject to an easement for public passage or for other important public purposes. See Municipalities Br. at 1-2, 9-10; States Br. at 2-3. In addition, as explained by the Churches, numerous religious organizations have entered into similar property transactions with local governments, transactions that could all be invalidated under the Tenth Circuit's approach. See Churches Br. at 4-6.[6]

CONCLUSION

For these reasons, and for those explained in the petition and the briefs of *amici*, a writ of *certiorari* should be granted. In the alternative, the petition should be held pending a decision in *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003).

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[6] As explained in the petition (at 20-21), the decision below also raises serious Establishment Clause concerns because the City is now forced to regulate speech on a religious plaza created by a single religious denomination. *See* Municipalities Br. at 11-12; Churches Br. at 10. Respondents attempt to minimize these obvious problems by arguing that the situation here is no different than the regulation of speech "on the streets and sidewalks that run past the local church or synagogue." BIO at 21. But that ignores the undisputed evidence that the pathways at issue here do not simply "run past" the Church's key religious sites; they run through the middle of what is now a Church-owned religious plaza – a plaza which fits seamlessly into the Church campus and which borders it on virtually every side. *See* Pet. App. 98a-106a (pictures and maps of current plaza). By requiring the City to regulate speech on the Plaza in those circumstances, the Tenth Circuit has created enormous risks of entanglement, not to mention endorsement by the City of the Church's religious message.

Respectfully submitted,

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